

(27,849)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 492.

DETROIT UNITED RAILWAY, APPELLANT,

vs.

CITY OF DETROIT ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MICHIGAN.

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1 In the Supreme Court of the United States.

No. —.

THE DETROIT UNITED RAILWAY, Appellant,

VS.

CITY OF DETROIT et al., Appellees.

Return of Clerk of Court to Claim of Appeal in Above-Entitled Cause.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

2 The District Court of the United States, Eastern District of Michigan, Southern Division, in Equity.

#329.

THE DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

Bill of Complaint.

Stevenson, Carpenter & Butzel, Attorneys for Plaintiff.

Donnelly, Hally, Lyster & Munro, and H. E. Spalding, of Counsel.

3 To the District Court of the United States for the Eastern District of Michigan and Southern Division thereof, in Equity:

The Detroit United Railway, the plaintiff herein, respectfully shows:

(1) That said plaintiff is a corporation organized and existing under the laws of the State of Michigan, and is a citizen of said State of Michigan, with its principal office in the City of Detroit, in the Southern Division of the Eastern District of said State; that it files this its bill of complaint against and makes defendants thereto, the City of Detroit, which is a municipal corporation of the State of Michigan, and a citizen thereof, and the following named persons, who are citizens and residents of said last named State and of said Southern Division of said Eastern District of Michigan, viz: James Couzens, the Mayor of said city, Henry Steffens, Jr., the Controller of said City; and Ralph Wilkinson, William B. Mayo, and Griffith O. Ellis, members of the Board of Street Railway Commissioners of

said City of Detroit; and Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John C. Nagel, David W. Simons, and James Vernor, members of the Common Council of said City, which is the legislative body thereof.

(2) That the plaintiff, whose authorized capital stock is \$15,000,000, all of which is paid in; is the owner of and operates all the street railway lines in said City of Detroit, having an aggregate
4 single track mileage of — miles, and which includes the following lines of street railway:

(a) The so-called Fort Street lines, which include, besides the trackage described in Paragraph 11 of Section I of the Ordinance of the City of Detroit in Section (3) of this Bill of Complaint mentioned (commonly known as the Fort Street lines east of Artillery Avenue), all the trackage upon Fort Street between Artillery Avenue and Dearborn Avenue, on Dearborn Avenue between Fort Street and West Jefferson Avenue, and upon West Jefferson Avenue between Artillery Avenue and the River Rouge;

(b) The Woodward Avenue line, comprising, besides the trackage described in Paragraph 12 of Section I, of said Ordinance, the trackage on said Avenue between Milwaukee Avenue and the northerly limits of the City of Detroit, so-called;

(c) A number of lines and parts of lines built under what are commonly known as the day to day agreements between said plaintiff and said City of Detroit, which lines comprise besides all of the trackage on streets described in paragraphs numbered 13 to 21, both inclusive, of said Section I of said Ordinance; certain other lines and parts of lines in said city. That the aggregate mileage of all of said day to day lines is 50.745 miles, and the aggregate mileage of such lines upon the streets described in said Paragraphs of said ordinance, including lines under construction, is 38.463 miles.

That there is attached hereto and made a part hereof, as Exhibit 1, a copy of the day to day agreement under which one of said lines was built, whose provisions are substantially the same as those of all others of said agreements.

5 That there is also attached hereto and made a part hereof, as Exhibit 2, a map which shows by appropriate designation all the said lines owned and operated by the plaintiff in said City of Detroit, and designates also, by distinctive marking, the trackage on the streets described in Paragraphs 11 and 12 of said Ordinance, and by other distinctive marking the trackage on those streets described in said paragraphs 13 to 21 of said Ordinance.

That the plaintiff also owns, either directly or through stock ownership, and operates divers lines of suburban and interurban street railroad, radiating from said City of Detroit and connected with the principal lines of urban street railway therein, and over said urban lines, affording transportation for interurban traffic to and from the business center of said City of Detroit, which interurban

lines connect said City of Detroit with many of the principle cities and towns in eastern and southern Michigan, and with the City of Toledo, in the State of Ohio, and which interurban lines have an aggregate mileage of approximately 365 miles.

That plaintiff is a tax payer in the City of Detroit, whose property therein assessed for and subject to taxation has an assessed value of upwards of \$25,000,000.00. That the bonds proposed to be issued under the terms of said ordinance will be a legal liability of the City of Detroit and as such payable out of moneys raised by taxation upon the property in said city, including the said property of the plaintiff. That on the basis of the present assessed valuation of said city the property of said plaintiff will be liable for taxes to be raised for such purpose to an amount greatly in excess of \$3,000.00.

6 (3) That on January 6, 1920, there was introduced in the Common Council of the City of Detroit an ordinance entitled "An ordinance relative to acquiring, owning, maintaining and operating a street railway system upon the surface of the streets, avenues, and public places of the City of Detroit, and within a distance of ten miles from any portion of the corporate limits that the public convenience may require for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof, within and without its corporate limits, and to submit to the electors of said City of Detroit a proposition to authorize and empower the City of Detroit to acquire, own, maintain, and operate a street railway system, and to borrow money upon the credit of the City of Detroit to an amount not to exceed Fifteen Million (\$15,000,000) Dollars, by the issuance of its public utility bonds therefor, and to call a special election to vote thereon," which Ordinance was adopted by the Common Council of said City on February 27, 1920, and duly approved by the Mayor of said City, and of which ordinance a copy is hereto attached and made a part hereof, marked Exhibit 3.

That in Paragraphs 11 to 21, both inclusive, of the "Class A" lines in Section 1 of said Ordinance, there are described street railway tracks on which portions of the plaintiff's Fort Street lines, of its Woodward Avenue Line, and a number of its lines constructed under the so-called day to day agreements, are situate, as heretofore stated in the Second Section of this bill.

That on said Map, Exhibit 2, the proposed street railway lines described in said Ordinance, and the several classes thereof, A. B. and C., are indicated, as appear by the conventions attached
7 to said map; and there are also indicated, as appear by said conventions, the streets and parts of streets covered by said proposed lines, which are occupied by tracks of the plaintiff, hereinabove referred to.

That the proposition set forth in the Second Section of said Ordinance as the proposition to be submitted to the electors of the City of Detroit was submitted to said electors at a special election held on the 5th day of April, 1920, and at said election, as the results thereof were reported by the City Clerk before the canvass of the votes required by law, which canvass has not yet been com-

pleted, received the affirmative vote of over three-fifths of the electors voting at said election. That the vote on said proposition on the face of the returns of said election as reported by the City Clerk was, for the adoption of the proposition 89,285, and against the proposition 51,093, being a total vote thereon of 140,378, the percentage of the total in favor of said proposition being approximately 63.6.

That the present value of that portion of the street railway tracks, with poles and other fixed equipment now in the streets and parts of streets described in said Paragraph 11 of Section I of said Ordinance, is approximately \$1,400,000, and that the mileage of the street railway tracks in said streets and parts of streets is approximately sixteen miles of single track.

That said tracks and property are an essential part of the plaintiff's said Fort Street line, and that without them the balance of said line, which comprises approximately 13.7 miles of single track and has a value of approximately \$800,000, could not be practically operated, and would have little or no value in excess of the scrap value.

That the present value of the street railway tracks, with poles and other fixed equipment now in that part of Woodward Avenue south of Milwaukee Avenue, described in Paragraph 12 of Section I of said Ordinance, is approximately \$614,000, and that the mileage of the tracks in that part of Woodward Avenue is approximately 6.88 miles of single track; that said trackage and property in that part of Woodward Avenue is an essential part of the plaintiff's Woodward Avenue line; and that without it the balance of said line, which comprises, between Milwaukee Avenue and the northerly city limits, approximately 11.927 miles of single track, which has a value of approximately \$953,000, could not be practically operated, and would have little or no value in excess of its scrap value.

That the present value of the street railway tracks, poles and other fixed equipment now in the streets and parts of streets described in said Paragraphs 13 to 21 of Section I of said ordinance, is approximately \$3,750,000; and that the mileage of the said street railway tracks now constructed in said streets and parts of streets is approximately 29.779 miles of single track.

That said tracks and property, are essential parts of the plaintiff's day to day lines, and that without them the remainder of said day to day lines, would be greatly diminished in value.

That all of the tracks and property on all the streets and parts of streets described in Paragraphs 11 to 21, both inclusive, of said ordinance, are connected at different points with the other lines and tracks of plaintiff's system of street railways in the City of Detroit, and form an essential part thereof, and are necessary to the efficiency of said system and to the proper rendition of the service rendered thereby, and that by taking away said tracks and property said system would be disrupted and the remainder thereof would be greatly impaired in use and in value.

(4) That on the 28th day of February, 1913, the Supreme Court of the State of Michigan, in a case wherein the City of Detroit was complainant and said Detroit United Railway was defendant, commonly known as the Fort Street Case, entered a decree, a copy of which is hereto attached and made a part hereof, marked Exhibit 4, which provided that if and when the City of Detroit, by resolution of its Common Council, should so require, the defendant company should cease operating its lines in said decree described, being the lines on said streets and parts of streets which are described in paragraph 11 of said ordinance, and which are commonly known as the Fort Street lines, east of Artillery Avenue, and should remove its tracks and property from said streets, and also provided for the enforcement of the provisions of the decree by appropriate process. That no resolution for cessation of operation or removal thereof has ever been passed by the Common Council of the City of Detroit, and no attempt has ever been made by said city to obtain enforcement of the decree in said Fort Street case.

That instead of attempting to obtain enforcement of the decree in said Fort Street Case, and notwithstanding the fact that said City of Detroit claims that the street railway franchise on that part of

10 Woodward Avenue described in Paragraph 12 of said ordinance has expired, the operation of the lines covered thereby has continued, and still continues, and said City of Detroit by numerous proceedings and acts has manifested its recognition of the fact, which is a fact, that said lines east of Artillery Avenue and said Woodward Avenue line south of said Milwaukee Avenue were and are essential parts of the street railway transportation system of the city, and that the continued and uninterrupted operation thereof was and is necessary in the public interest, and necessary to preserve and promote the public welfare and the prosperity of the City.

That the population resident in the territorial limits of the City of Detroit and in its immediate suburbs, which form with it a single, industrial, commercial and residential center, exceeds one million, and is distributed over all sections and parts thereof. That said City is essentially industrial and that much the largest part of its male population is employed in great industrial plants and factories within and adjacent to the City Limits, largely at the outskirts of the city, and mostly remote from the residences of the employees, necessitating transportation of the employees to and from their homes and places of employment. That the plaintiff's street railway system is substantially the only means for transporting such employees between their homes and places of employment, and that the interruption of the operation of the plaintiff's street railway system as a single unit, or the separation therefrom of the lines and parts of lines on the streets described in paragraphs 11 to 21 of said Ordinance, would paralyze the industrial and business life of said City, throw thousands of its residents out of employment, and shut down its industrial plants and factories. That it would be im-

11 possible adequately to serve the transportation needs of the residents of Detroit by the operation of the plaintiff's lines

without the portions thereof on said streets described in said paragraphs of said ordinance, and by the separate operation as a municipal system of the lines proposed to be acquired under the terms of said ordinance. That the physical value of the property comprising plaintiff's street railway system in the City of Detroit and used for and necessary to its transportation service to the people resident therein is in excess of \$41,000,000.00.

That among the acts on the part of the City of Detroit in recognition that said Fort Street Lines east of Artillery Avenue and said Woodward Avenue line south of Milwaukee Avenue are an essential part of the street railway transportation system of the City, and that their continued operation is likewise necessary, are the following:

The agreement of August 7, 1913, being resolutions adopted on that date in acceptance of a proposition made by the Detroit United Railway; the so-called Kronk Ordinance, being an ordinance adopted by said Common Council August 9, 1918; the commencing by said City of Detroit in the Circuit Court for the County of Wayne in Chancery on June 9, 1920 of a suit against said Detroit United Railway and certain of its officers, by filing a bill of complaint containing certain statements, copy of which is hereto attached, said suit being chancery file No. 70,247, in which suit a decree was rendered, copy of which, and a copy of the resolution passed by said Common Council pursuant to, and to carry out the terms of said decree, are likewise hereto attached, said agreement of August 7, 1913, said ordinance, said extracts from said bill, said decree, and said resolution being hereto attached as Exhibits 4-a, 4-b, 4-c, 4-d, and 4-e, respectively.

12 (5) That since the expiration of the franchises on said Fort Street Lines east of Artillery Avenue determined to have expired in the decree in said Fort Street Case, there has been necessarily expended by the plaintiff, to the end that the operation of its Fort Street Lines might continue and that proper service thereon and over its said city system might be given, and with the knowledge, acquiescence, and either tacit or express approval of said City of Detroit and its officials in the reconstruction of and additions and betterments to the said Fort Street Lines the sum of \$1,497,922.82, of which amount at least \$894,036.00 was expended on said Fort Street Lines east of Artillery Avenue, and that by far the larger part, both of said total expenditure on all said lines, and of said total expenditure on lines East of Artillery Avenue, has been made since the entry of said decree in February 1913.

That in the year 1909, in which year said City of Detroit claims that the franchise for that portion of said Woodward Avenue line south of Milwaukee Avenue expired, plaintiff expended in the reconstruction of tracks in that part of Woodward Avenue \$65,336.34, and that, together with said expenditure, there has been necessarily expended by the plaintiff, to the end that the operation of the said Woodward Avenue line might continue, and the proper service might be given by its said city system, and with the knowledge, acquiescence and either tacit or express approval of the City

of Detroit and its officials, in reconstruction of and additions and betterments to that part of said Woodward Avenue Line down to and including the year 1919, \$229,536.06.

13 That by the present charter of the City of Detroit, the Commissioner of Public Works thereof is required to supervise the making of all excavations in or under the streets, alleys and public places, the laying therein of pipes, wires, cables and so forth, the erection therein of poles and the restoration thereof to normal conditions, and such Commissioner is charged with the duty of issuing permits for an entry on such streets, alleys and public places for any of said purposes or for any other purpose obstructing the use thereof by the public, and the entry upon and occupation of streets, alleys and public places for any such purpose is permitted only in the time and manner that the Commissioner may prescribe; that said Commissioner is also required to make proper charges for such supervision and the inspection necessary in connection therewith. That similar provisions were contained in the City Charter preceding the present Charter, which was in force from a period before 1909 down to the adoption of the present charter.

That pursuant to the practice by said charter provisions required, all the work covered by said expenditures on said Fort Street and Woodward Avenue lines was done under written permit from the Commissioner of Public Works, issued upon written application of the plaintiff stating the location and character of the work to be done. That all said work was done under the supervision of a city inspector designated pursuant to said charter requirements, for whose services a bill was in each case rendered by the City to the plaintiff, and paid by it. That many such permits were issued and work done thereunder in pursuance thereof in each year since 1909, and that the aggregate of the inspection charges paid to the City thereunder is several thousand dollars.

14 That in a number of cases, though not in all, the work done resulting in said expenditures was done under authority and by direction of a resolution of the Common Council of said City of Detroit, and that numerous other resolutions during said period were passed by said Common Council directing changes in the service rendered over said part of said Fort Street and Woodward Avenue Lines, and directing other acts by the Company for the improvement of the conditions of such service, all of which involved considerable expense to said street railway company, and all of which were by it complied with. That none of said resolutions contained any limitation upon the time during which they were to be operative, or upon the time during which the property whose use and usefulness was affected by compliance therewith, should continue to be used for street railway purposes by said street railway company. That in consequence of said several acts and proceedings by said Common Council, and other officials of the City of Detroit, and of said expenditures by said street railway company, under city authority, upon said Fort Street lines east of Artillery Avenue and upon the part of said Woodward Avenue south of Milwaukee Avenue and its continued operation thereof, with knowledge, consent and ap-

proval of the city authorities, and by reason of the facts in this and in the preceding section of this bill, No. 4, set forth, the right of the City of Detroit to require and enforce the removal of said Fort Street lines east of Artillery Avenue, in accordance with the provisions of said decree, has ceased; and the right of said City, if it ever had a right, to enforce the removal of the part of said Woodward Avenue line south of Milwaukee Avenue, has likewise ceased; and that the plaintiff has acquired and has the right, and is charged with the

15 duty to continue to maintain and operate said lines of street railway in the streets wherein they are situated until such time as the discontinuance of such maintenance and operation shall be consistent with the public interest.

That of the aggregate track mileage owned and operated by the plaintiff in the City of Detroit, which is 289.869 miles, there are approximately 92 miles, including said mileage on Woodward Avenue south of Milwaukee Avenue, and the Fort Street Lines east of Artillery Avenue, the franchises for which are claimed by the City of Detroit to have expired.

That there has been expended on said trackage the franchises for which are claimed to have expired, in order that the operation thereof might continue and that the plaintiff's city system as a whole might render efficient service, and with the knowledge, acquiescence and approval of the City of Detroit, and its officials, and under permits obtained, and in compliance with resolutions of the Detroit Common Council passed in like manner as the permits and resolutions hereinbefore referred to concerning said Fort Street and Woodward Avenue lines, since 1909, the sum of approximately \$2,800,000.00.

(6) That said ordinance, voted on at said election of April 5, 1920, was originally submitted to the Common Council January 6, 1920, with a message from the Mayor of the City recommending its adoption, of which message a copy is hereto attached and made a part hereof, marked Exhibit 5. That the "so-called Fort Street Line and the Woodward Avenue line to Milwaukee Avenue" referred to in said message as lines proposed to be taken over, comprised the plaintiff's trackage known as the Fort Street lines east of Artillery Avenue, and its trackage on Woodward Avenue south of Milwaukee, and are the tracks on the streets and parts of streets described

16 in paragraphs 11 and 13 of Section I of said ordinance. That the present value per mile of said Fort Street Lines east of Artillery Avenue, including fixed street equipment on the basis of the present reproduction cost, less depreciation, is approximately \$87,000.00 per mile of single track, and that the present value of said Woodward Avenue trackage, including said fixed street equipment on the same basis — approximately \$90,000 per mile of single track. That if all of said lines east of Artillery Avenue were removed, the cost of construction of new trackage, together with fixed street equipment to replace the same, would, at present prices of material and labor, be at least \$95,000 per mile of single track, making a total cost of construction of new trackage and equipment on the streets described in Section 11 of said ordinance of at least \$1,520,000.

That if said Woodward Avenue line south of Milwaukee Avenue were removed, the cost of replacement thereof by new trackage with fixed street equipment would, at present prices for material and labor, be approximately \$105,000 per mile, making a total cost of construction of new trackage and equipment on the streets and parts of streets described in Section 12 of said ordinance, of \$725,000.

That the mileage of the lines in Classes "A" and "B," mentioned in said ordinance, is 156.25 miles, and of the Class "C" lines therein is 55.25, being a total of 211.50. That the cost of acquiring the said lines proposed in said ordinance to be acquired would, whatever method of acquisition were adopted, exceed by many millions of dollars the amount of bonds provided for in said ordinance, and would upon the methods and at the estimated costs stated by the mayor's message, Exhibit 5, exceed the amount of said bonds by nearly four million dollars.

17 (7) That the main business center of the city of Detroit lies within the one-mile circle shown on said map, Exhibit 2, of which circle the center is the City Hall, situated at the corner of Fort Street and Woodward Avenue, and from which center the main thoroughfares of said city radiate. That the relative location of manufacturing, business and residence districts in said city and its suburbs and the plan of said city as shown by said map, Exhibit 2, are such that a large part of the street railway travel in said city is and necessarily will continue to be through and to and from said principal business center. That the only means of access to the said business district which will be afforded by the street railway lines proposed in said ordinance are by tracks upon the streets described in Paragraph 11 of said ordinance now occupied by said Fort Street Lines east of Artillery Avenue, and upon that part of Woodward Avenue described in Paragraph 12 of said ordinance. That the tracks upon the streets described in paragraphs 13 to 21 of said ordinance now occupied by certain of plaintiff's so-called day to day lines as hereinbefore set forth are essential to the connection of the remaining lines in said ordinance described with the tracks affording access to said business district. That said trackage affording access to said business district is essential to the efficiency and usefulness of all of said proposed city lines, and that without said tracks or without the tracks on said streets described in paragraphs 13 to 21 of said ordinance the remaining lines proposed to be acquired by the said city would be of little or no practical use and would be of no substantial public benefit.

(8) That the lines now on said streets described in Paragraph 11 of said ordinance carry approximately 23,000,000 revenue passengers per year. That the line on said streets described in Paragraph 12 of said ordinance carries approximately 55,000,000 revenue passengers per year, and that the number of revenue passengers annually carried upon the plaintiff's entire city system is approximately 330,000,000. That the lines now upon said streets described in Paragraphs 11 and 12 of said ordinances are the only convenient means by which many thousands of people

living or doing business in large sections of the city can be transported between their residences and places of business. That if said proposed street railway lines are acquired and put in operation on said streets in connection with the other lines proposed to be acquired by the City of Detroit, as stated in said ordinance, the transportation thereby afforded would but inefficiently and inadequately answer the public needs, and would answer said needs much less adequately than does the present system of street railway transportation.

(9) That included in the lines proposed to be acquired in said ordinance, is a line described in paragraph 10 thereof, which runs in part through the City of Highland Park, and another line described in paragraphs 23 and 28 thereof, running in part through the Village of Hamtramck, which city and village are both included within the exterior boundaries of said City of Detroit. That said proposed trackage in the City of Highland Park and in the Village of Hamtramck, particularly that in said City of Highland Park, are important links in the municipal street railway system proposed by said ordinance and essential to the operation and efficiency of the remainder thereof. That over the streets covered by said proposed trackage in Highland Park and Hamtramck there is no existing street railway franchise, and that under the charter of the City of Highland Park, to which plaintiff craves leave to refer with the same force and effect as if the same were herein recited, and under the general laws of the State of Michigan there is no power or valid authority to grant such street railway franchise to the City of Detroit, and therefore no authority under which the right to construct and operate street railway trackage in either the City of Highland Park or said Village of Hamtramck can be obtained.

(10) That should said lines now in operation on said streets described in paragraphs 11 and 12 of said ordinance be removed and other lines constructed in place thereof, there would under the most favorable circumstances be a serious and long-continued suspension and interruption of railway traffic over said streets, which suspension of traffic (owing to the fact that a large part of the traffic over said Fort Street line east of Artillery Avenue, and over said Woodward Avenue line south of Milwaukee Avenue, either originates at or is destined to points on other street railway lines in said city connected with said Fort Street lines and said Woodward Avenue line at points appearing on said map, Exhibit 2) would greatly impair the service and efficiency of the whole system of street railway transportation in said city, with consequent serious loss and inconvenience to the traveling public and to the general interests of the city.

(11) That should the city acquire the street railway trackage set forth in said proposition ratified April 5, 1920, it must be either by the removal of said tracks on the streets described in paragraphs 11 and 12 thereof, and the replacement thereof with new tracks, or by taking over the present tracks as part of the city trackage. That if the first alternative be adopted, it would involve disruption of the

service and loss to the public, as already pointed out, and the expenditure upon new tracks of an amount considerably in excess of the value of the present trackage, while, inasmuch as the value of the material removed would but slightly exceed the cost of removal, it would also involve a great direct loss to the plaintiff, and as already shown, greatly diminish the value and the efficiency of the remainder of its system. That in like manner, the taking over by the City of Detroit of the trackage on streets described in paragraphs 13 to 21 of said ordinance would greatly diminish the efficiency of the remainder of the said system and greatly impair the value thereof.

(12) That the charter of the City of Detroit was first amended so as to permit the city to acquire and operate a municipal street railway system, in 1913, by the addition to the charter of the chapter which now appears as Chapter 13 of Title 4 of the present charter, to which reference is hereby made. That since said charter amendment the question of municipal ownership of street railways has been much debated and discussed in said city, resulting in great diversity of opinion, not only between those who do and those who do not desire such municipal ownership, but among the large number of people who are desirous of the municipal ownership of street railways. That there have been and are now a large number of voters advocating municipal ownership of street railways who desire that the city should construct a system of its own, and not attempt to acquire any of the existing lines of the Detroit United Railway, and propositions for the acquirement of such lines have twice failed of approval on submission to popular vote. That there are also a large number of voters who, while favoring municipal ownership, do not desire the construction by the city of any lines where lines now exist, but are in favor of acquiring such lines from the present company, either by purchase or condemnation. That said proposition voted upon and ratified by the electorate on April 5, 1920, was manifestly framed with a view to this division of public sentiment, and for the purpose of combining if possible the votes both of those who favor purchase and those who favor construction as methods of municipal acquisition. That such was the design and purpose was admitted by Corporation Counsel Clarence E. Wilcox, the legal adviser of the city, who participated in the framing of said ordinance, in a public statement made on March 27th, 1920, and appearing in the Detroit Free Press of March 28th, as follows:

"Omission of a contract to purchase the 34.25 miles of D. U. R. 'day-to-day agreement' lines from the Couzens street car plan was not all oversight, Corporation Counsel Wilcox said Saturday, but was not included so the city might be free to order those tracks torn out and replaced with city-built lines.

He also said that it would have been impossible to present the ordinance divided into sections in which the construction features were separated from the purchase phase of the plan.

'It would never pass if so divided,' he explained. 'Some voters who

11 favored the construction of lines by the city might object to a purchase plan, and those who approved purchase might not wish to approve a construction plan.

'The objection to the ordinance which has been made, namely, that it contained no revision (s. c. provision) for the purchase of existing street railway was given careful thought when the measure was drafted,' Mr. Wilcox continued.

22 'As I recall the language of the charter provision referred to, it means that a contract to purchase a street car "system" shall be void unless approved by a three-fifths vote.

'It may develop that the city will find it cheaper and more expedient to order the company to remove its tracks from those streets now operated as day-to-day lines and build the tracks itself.' "

That said ordinance contains in Section 1 thereof an express direction and command to the Board of Street Railway Commissioners of the city to construct the proposed street railway lines, and by its true construction and meaning prohibits the acquisition of any of said proposed lines by purchase of existing lines from said street railway company. That said express direction and limitation are omitted from the statement of the proposition to be submitted to the electors in Section 2 of said ordinance, and *was* omitted in the statement of said proposition upon the ballots provided by the City of Detroit for use and used at said election of April 5, 1920. That the effect and intent of said omission was to mislead the voters of the city into supposing that the effect of said proposition if carried would be to authorize the acquisition of said street railway lines either by purchase or by construction.

That to the end that the voters of said City of Detroit might suppose, and to induce them to believe, that the trackage now upon the streets described in paragraphs 11 and 12 in Section 1 of said ordinance, being the Fort Street lines east of Artillery Avenue, and the Woodward Avenue line south of Milwaukee Avenue, could, if such proposition were adopted, and would, be obtained by purchase, and at a price much under their real value, the mayor of said city
23 in his said message, Exhibit 5, recommending the adoption of said ordinance, stated:

"We propose to take over the so-called Fort Street line and Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which it is safe to assume the railway will be glad to deliver us in preference to getting off the streets, at say an estimated cost of \$40,000 per mile."

That as a further means to induce, and with the intent of inducing the voters of the City of Detroit to believe that said Fort Street and Woodward trackage could, if this proposition were adopted, and probably would, be acquired by purchase, and at a price much less than their value, said City of Detroit and the Mayor and Common Council thereof caused to be prepared and distributed to the voters in said city some weeks prior to said election of April 5, a document, of which a copy is hereto attached, marked Exhibit 6, pur-

porting to be a statement of the street railway plan to be voted on at said election, containing the proposition to be voted upon in the form prescribed in said ordinance, and containing portions of said ordinance, but omitting the part of Section 1 thereof which contains said direction and command to the Board of Street Railway Commissioners to construct said street railway lines, and without any indication that any portion of said ordinance was omitted. That said document upon the back thereof contained a map showing in red the street railway lines proposed to be acquired by said ordinance, each line being numbered, together with a statement of the financial plan for their acquisition, which financial statement contained among other things the following:

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"Financial Plan for A and B Lines.

"Present trackage to be taken over at cost, less depreciation, as specified at the time the company was given permission by the city to build, under a day-to-day agreement.

"34.25 miles, estimated at \$40,000..... \$1,370,000.00

"Fort and Woodward Tracks where franchise has expired, 21.25 miles estimated at \$40,000..... 850,000.00"

There was appended also to said statement a key to the lines as numbered upon the map, which key included the following statement:

"D. U. R. lines taken over, Nos. 11 to 21 inclusive."

That at the foot of the said statement of said street railway plan appeared the following:

"This official information on the new street car plan is issued by the B. of St. R. C."—(meaning Board of Street Railway Commissioners)—"with approval of Common Council."

As plaintiff is informed and believes, and therefore alleges, the so-called sample ballot with the official information endorsed thereon above referred to, was distributed prior to the last day for the registering of the voters to vote at said election on April 5th, and at addresses taken from the previous registration list.

By reason of the fact that large numbers of electors who had previously registered had changed their residence, and the further fact that large numbers of new voters for the first time registered at the date of last registration, to-wit, on March 20th, many thousand electors who voted upon the proposition above referred to on April

5th, to-wit, a number exceeding 10% thereof, had not received and did not receive or have the benefit of the sample ballot with the explanatory information endorsed thereon to guide them in reaching their decision as to how they desired to vote; while the greater number, to-wit, a number exceeding 75% thereof, had received such sample ballot with such official information endorsed thereon. That by reason of such situation, large

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numbers aggregating many thousands voted upon said proposition on April 5th with different understandings as to the question to be determined at the election of April 5th.

That during an active campaign of several weeks preceding said election, numerous speeches were made by the Mayor of the City of Detroit, and other advocates of the adoption of said proposition, submitted at said election of April 5, and numerous articles appeared in certain newspapers of said city, favoring the adoption of said proposition, which speeches and articles contained statements of the same tenor and purport as that above quoted from the said message of the mayor and those appearing upon said document distributed among the voters of the city as above set forth. That the several matters, representations and statements in this section of this bill of complaint set forth, together with the omission from the proposition itself and from the statements distributed among the voters of the matter contained in Section 1 of the ordinance above referred to, were adapted to and were intended to induce the voters of the City of Detroit to believe that under said proposition submitted at said election, if carried, the city would be empowered but would not be required to purchase said Fort Street lines east of Artillery Avenue, and said Woodward Avenue line south of Milwaukee Avenue, and would be able to force the street railway com-

26 pany to sell said lines to the city at much less than their value by the threat that if such sale were not made, the removal of said lines from the streets would be compelled, with consequent destruction of their value, and a serious impairment of the value of the other lines and property of said street railway company in said city.

(13) That the City of Detroit, in recognition of the fact that the public interest imperatively requires the uninterrupted continuance of street railway transportation over said Fort Street lines east of Artillery Avenue, and over said Woodward Avenue line south of Milwaukee Avenue, has never demanded either the stoppage of operation thereof or the removal of the trackage therefrom. That in view of the facts hereinbefore set forth, and as plaintiff is advised and verily believes and charges, said city and the other defendants herein do not desire to design the abandonment of use of said streets for street railway transportation purposes, nor intend the construction of new lines thereon, but that said defendants do propose and design, (inasmuch as the franchises under which said Fort Street lines east of Artillery Avenue were originally constructed have expired, as determined in said decree Exhibit 3, and inasmuch as it is the claim of the city that the franchise under which the part of said Woodward Avenue line south of Milwaukee Avenue was constructed, has expired, and that therefore the City can forthwith compel the removal of said Woodward Avenue tracks) by the threat of requiring the removal of said tracks (which removal would destroy practically the entire value of the property removed, and would greatly impair the value and usefulness of the remaining lines of the Detroit United Railway in the City of Detroit) to force said

27 Detroit United Railway to sell the trackage and equipment upon said streets for an amount much less than their real value. That for this reason, among others, said proposition submitted to the voters on April 5, 1920, was framed in general terms, not specifically committing the city to the purchase of said lines, and not including any contract of purchase. That said ordinance in which said provision was embodied was framed in furtherance of said design, and to the end that said City of Detroit may acquire said Fort Street lines east of Artillery Avenue, and said Woodward Avenue line south of Milwaukee Avenue, as a part of its proposed municipal system, and at a price much under their real value, and under the cost of construction of those new lines, which, if the existing lines were removed, would be required to replace them. That but for the formation of said design, the passage of said ordinance and the adoption of said proposition in pursuance thereof, and the purpose to carry out the plan of municipal acquisition and operation of the street railway system therein set forth, no attempt to deprive the Detroit United Railway of its property in said lines, and no attempt or threat to compel the removal thereof from said streets, would be made.

That while, in accordance with the decision in the Fort Street case above referred to, a municipality may compel a street railway company to remove its tracks and property from streets wherein the company's rights have expired, when the public interest may so require, either in order that such streets may be left free for other traffic, or to enable the construction of new street railway lines thereon, such municipality cannot rightfully order or attempt such removal of tracks for the purpose, not of obtaining their removal, but to force their sale to the city at less than their value, and less than the cost of replacement, to the end that the tracks may remain, but the ownership thereof be transferred from the company to the municipality. That such action on the part of the municipality would be in bad faith and illegal, and that the plan and purpose of the City of Detroit and its co-defendants hereinbefore set forth, as regards said Fort Street lines east of Artillery Avenue, and said Woodward Avenue line south of Milwaukee Avenue, is therefore illegal.

28 The said ordinance was not composed and drafted for the purposes therein stated, of constructing lines of street railways upon any of the streets therein enumerated, upon which plaintiff now has and operates lines of street railways. This appears by Exhibits 5 and 6 hereto attached and was many times openly and publicly stated by the said mayor and his more active confederates after the submission of said ordinance, and before the voting thereon. But the said ordinance was by the said mayor, and his subservient associates, wickedly conceived and cunningly devised with the intention and for the purpose of trampling upon and setting at naught those ideas and conceptions of honesty, decency and fairness which it is now and from the earliest ages has been, the function of courts of justice to vindicate, and of circumventing the high constitutional principles embodying those ideas and conceptions.

It is the pernicious and mendacious purpose of the said mayor, assisted by his said subservient associates and appointees at his behest and command to take the property of the plaintiff, that is
 29 the street railway tracks and overhead equipment now existing on the streets in said ordinance enumerated, for the use of the City of Detroit and the people thereof, as such street railway tracks and equipment, without paying the plaintiff fair and reasonable compensation therefor.

The said intention and purpose is to so take the corpus of said street railway without fair and reasonable compensation just as the officials of said city attempted by the ordinance before the court in Detroit United Railway versus City of Detroit, 248 U. S. 429, to take the use of the identical lines without fair and reasonable compensation. The method of accomplishing said dishonest and unlawful purpose the said mayor and some of his associates have many times openly and publicly stated to be (indeed, the intent and purpose to use this method is clearly indicated in the mayor's message to the Common Council, Exhibit 5, and the sample ballot, Exhibit 6), that he will offer to plaintiff the sum of \$40,000.00 for each mile of track (including overhead equipment) so to be taken, which sum is—as is well known to said mayor and his associate defendants—less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associate defendants will order said tracks and equipment removed from said streets. Thus it is not proposed or intended by the said mayor and his associates, to exercise the claimed power of ordering said tracks and equipment removed from said streets, because said railways are no longer required thereon for the public convenience, or desired thereon, or for any other legitimate or good-faith purpose.

The claimed power of so ordering said tracks and equipment to be removed from said streets is to be exercised only as a pretense, pretext and subterfuge for the accomplishing of the said
 30 iniquitous scheme of taking said property from the plaintiff for use as a street railway in its precise present condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor.

Plaintiff is aware that on occasions individuals of piratical and conscienceless tendencies have taken advantage of other individuals in private affairs of business and life, and have accomplished schemes of somewhat similar moral turpitude. But plaintiff asserts that a municipal or political subdivision of a state is by the high and beneficent principles and provisions of the Constitution adopted by the People of the United States, constrained to deal honestly and fairly with all persons, and not to take the property of any of them without due process of law, that is, paying fair and reasonable compensation therefor.

Plaintiff shows and insists that it is the duty of the court, and that the court by right ought, and in justice must, strike directly at the vicious and unconscionable purpose clearly apparent in this scheme for the taking of the property of plaintiff without fair and reasonable compensation therefor, and enjoin the accomplishment

thereof. There is, as said Mayor and his associate defendants well know, a regular and orderly method of procedure prescribed by the laws of the State of Michigan for taking said property by the City of Detroit, if said property is desired by said city, but said procedure requires payment of fair and reasonable compensation. The carrying out and accomplishment of said iniquitous and unlawful purposes and schemes by said Mayor and his associates is imminent and threatened. As recently as Wednesday, April 7, 1920, said Mayor has stated in the public press that he purposes and intends to proceed to coerce plaintiff in the manner above stated.

31

(14) If there be any uncertainty as to the proper construction of Section 25 of Article VIII of the Michigan State Constitution requiring the affirmative vote of the electors before a city can acquire a public utility, in its application to this case, as well as of the proper construction of the proposition submitted to the electors, nevertheless under any permissible construction, said proposition for acquisition was not so submitted to the electors that their affirmative vote thereon empowers the city to acquire the street railways designated in said proposition or any part thereof.

If in determining what was the real proposition of acquisition it be held that we are to look at the ordinance enacted by the Common Council rather than to the proposition submitted to the electors, the real proposition of acquisition was not submitted to the electors because there was omitted therefrom the following explicit language: "The said Board of Street Railway Commissioners shall construct, own, maintain and operate" the street railways herein designated. With this explicit language omitted, the electors would not understand that the adoption of the proposition would mean that the street railway tracks on Woodward Avenue and Fort Street and on the day-to-day lines, were to be torn up and new tracks constructed in their place. With this explicit language omitted, it was easy for the municipal authorities to induce the electors to credit, and they did induce them to credit their official statements representing that where these street railways existed they would be taken over.

32 Assuming that the real proposition of acquisition is that which was submitted to the electors, rather than that in the ordinance which was not submitted, the proposition of acquisition is susceptible of several constructions, none of which makes the affirmative vote of the electors a grant of power to the city to acquire the street railways designated in said proposition, or any part thereof.

If, in determining what was the proposition so submitted, the language upon the ballot is alone to be considered, it may be held that the proposition submitted was one to acquire by construction only. If so, the real proposition of acquisition was not submitted to the electors, for the "official information" upon the back of the sample ballot distributed to the electors informs them that the Woodward Avenue and Fort Street trackage and the day-to-day trackage is to be "taken over," and this so-called official information was relied upon by the voters.

It may be that the proper construction of the proposition submitted to the voters is this: the street railways on streets where no trackage exists are to be acquired by construction, and on streets where trackage exists, such trackage is to be acquired by purchase. That is the real plan of acquisition intended by defendants, and that is the plan of acquisition stated to the voters on the sample ballot. If that is the proper construction of the action of the electors in voting for the proposition, then what they have done is legally ineffectual because of the following explicit provisions in the city charter, Title 4, Chapter 13, Sections 6, 7 and 8:

33 "Sec. 6. It shall be the duty of said board to proceed promptly to purchase, acquire or construct and to own and operate a system of street railways in and for the city, and as soon as practicable to make said system exclusive. Said board shall, whenever it deems it necessary, build extensions and new lines. Such extensions and new lines shall be first approved by the common council.

"Sec. 7. Said board may purchase or lease, or by appropriate proceedings prescribed by law and in the name of the city condemn all or any part of the existing street railway property in the city, and in like manner said board shall have power to acquire a street railway property without the limits of the city as prescribed by law, if the board shall determine; or it may make the necessary purchase of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate in said city for said city and within a distance of ten miles from any portion of its limits as aforesaid, a system of street railways beneath, upon and above such streets and other places in the city and outside thereof as aforesaid as the common council shall from time to time elect.

"Sec. 8. Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any or special election, and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote."

34 It is an essential part of the plan of acquiring the street railways described in the proposition that these existing street railway lines herein mentioned, should be acquired by purchase. Without this the whole scheme would fail and as the intent of the voters to acquire these existing lines can be given no effect, so no effect can be given to that part of the proposition providing for the construction of the railways on the other streets. This is so because the electors voted to construct these railways on these other streets, upon the understanding, and only upon the understanding, that they would be made useful by the purchase of existing trackage on streets where that trackage did exist.

It is possible that the proposition of acquisition submitted to the electors is susceptible of the construction that it conferred authority

upon the Board of Street Railway Commissioners to acquire a street railway either by purchase or construction, as it might determine to be wise. In that case, an affirmative vote for the proposition does not authorize acquisition for several reasons:

(a) The electors cannot give such a broad power to the Board of Street Railway Commissioners.

(b) Because of the prohibition of Section 8 of Article XIII of the City Charter, such a proposition, though in form authorizing an acquisition by purchase or construction, is legally nothing more than a proposition to acquire by construction, and is objectionable because it represents to the electors that acquisition can be by purchase.

35 It is possible that in construing the proposition submitted it may be proper for a court to say some of those who voted affirmatively may have got all their ideas of the proposition from reading what was contained in its body; while others got all their ideas from reading the so-called "official information" on the back of the sample ballot, therefore some may have voted for it because they believed it to be solely a proposition to acquire by construction, while others voted for it because they believed it to be a proposition to acquire the existing lines by purchase. Under this reasoning, the proposition was not properly submitted because it was so submitted as to get the votes of those who were opposed to construction through their beliefs that it was a purchase proposition, and to get the votes of those opposed to purchase through their beliefs that it was a construction proposition.

The proposition for acquisition was not so submitted to the electors that their affirmative vote thereon empowers the city to acquire the street railways designated in said proposition or any part thereof, because neither in the ordinance nor in the body of the proposition is there any estimate of the cost of acquisition, and the proposition for acquisition submitted to the elector must include such an estimate; and also because no limit upon such cost is fixed in the proposition. If it be permissible to consider the estimate appearing upon the sample ballot distributed among the voters in advance of the election, that estimate covers the acquisition of lines of Classes "A" and "B" but not of Class "C." By the affirmative vote of the electors they gave the same power to construct lines in Class "C" as they do for Classes "A" and "B." Their vote if it is effectual at all is a vote empowering the construction of many miles of trackage without any limitation whatsoever upon the amount to be expended there-

36 for, or any indication of where and how that amount is to be raised. A favorable vote upon a blanket proposition like this means nothing and confers no authority.

Plaintiff further avers that it is an essential part of the real proposition of acquisition that the city will, by the threat that it will make plaintiff cease operating and remove its tracks from the street, and by other illegal means, compel plaintiff to sell said tracks to the city for an inadequate price, and to thereby deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the

United States, that this illegal and unconstitutional part of the proposition cannot be executed, and that with it eliminated, the entire proposition of acquisition becomes abortive and useless, even if it could be said—and plaintiff denies that it can be so said—that legal effect could in that case be given to any other part of the proposition of acquisition.

(15) Under the Charter of the City of Detroit, to which reference is hereby made, the common council of said city is its legislative body and exercises all of its legislative powers.

The Board of Street Railway Commissioners of said city have the general powers of acquiring a municipal street railway system by construction, purchase or lease, and of providing the funds for the payment thereof, with the co-operation of the common council of said city, to the extent and in the manner, and subject to the limitations contained in Chapter XIII of Title IV of said Charter, to which plaintiff craves leave to refer with the same force and effect as if the same were herein recited, and particularly subject to the charter requirements that no contract of purchase or lease, and no
37 plan to condemn existing street railway property, is valid unless approved on submission thereof to vote of said electors and to the constitutional requirement in Section 25, Article 8, of the State constitution, that no municipality shall acquire any public utility unless the proposition to acquire it shall have first been submitted to and approved by the vote of the electors.

The mayor of said city has the power of veto of all legislative acts of the common council, and any act so vetoed can only be passed over his veto by a vote of two-thirds of the members elect of the council. The mayor appoints the city controller, and the controller is removable at his will without cause assigned. He appoints the Board of Street Railway Commissioners, who are also removable at the will of the mayor. He appoints the Commissioner of Police, who is the head of the Police Department of the city, and such Commissioner is removable at the will of the mayor without cause assigned. He appoints the Corporation Counsel, who is the head of the city Law Department, and who is removable by the mayor without cause assigned and at any time.

That the powers and duties of said city officials appear by the city charter, to which plaintiff craves leave to refer with the same force and effect as if it were herein recited. That all powers of said officials appointed by said mayor will be exercised by them in accordance with his will, and will be used to assist in carrying out the plan and purpose of acquisition by the City of Detroit of the plaintiff's property described and set forth in Sections 13, 14 and 16 of this bill.

(16) Plaintiff further avers that it is the claim of the defendants that the effect of the vote of the electors of the City of Detroit gives them as city officials full power and authority to compel said
38 plaintiff to sell to the city its trackage on Woodward Avenue and on Fort Street, and on the day-to-day lines heretofore

described for \$40,000.00 per mile, which, as heretofore stated, is very much less than its real value and very much less than it would cost the city if it constructed the same; and as to the day-to-day lines, it is very much less than the cost of the said lines to the plaintiff, less depreciation.

Plaintiff also avers that it is the intention of said defendants to enforce said claim and they have threatened to do so and plaintiff upon information and belief says they intend immediately to take steps to enforce it.

Plaintiff further avers that it is the intent and purpose of said defendants, note particularly the mayor's message submitting the ordinance—which purpose they have threatened to execute—to say to plaintiff, "You must either sell your trackage at the inadequate price the city offers, or cease operating your cars thereon and tear up and remove the same from the streets."

This in the circumstances stated in this bill is, plaintiff avers, a resort to illegal means to compel plaintiff to sell its property for an inadequate price, and to thereby deprive it of its property without due process of law in contravention of the due process of law clause of the 14th amendment of the Constitution of the United States.

Plaintiff further avers upon information and belief, that it is the intention of the said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will, and who will conform to his will, to resort to other illegal means to compel plaintiff to assent to a sale of its said property for said inadequate value, and thereby deprive plaintiff of said property
39 without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the United States.

Plaintiff further avers that after the election and before the votes were canvassed, and apparently upon the assumption that the vote on said proposition as reported by the City Clerk, and hereinbefore set forth, was correct, and therefore before said proposition or said ordinance became effective, said defendant Couzens by the acquiescence of the other defendants in this bill, caused the work of construction of said street railways to be started, and that it is the intention of said defendant Couzens, acting as mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same, and thereby deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th amendment of the Constitution of the United States.

(17) Plaintiff alleges that the matter in dispute between the parties in this suit exceeds the sum of One Million (\$1,000,000.00) Dollars, exclusive of interest and costs, and arises under the Constitution of the United States.

Plaintiff therefore prays:

(a) That said City of Detroit, James Couzens, the Mayor thereof, Henry Steffens, Jr., the Controller thereof, Ralph Wilkinson, William B. Mayo, and Griffith O. Ellis, members of the Board of Street Railway Commissioners thereof, and Charles F. Biel-
40 man, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John C. Nagel, David W. Simons and James Vernor, members of the Common Council thereof, be made parties defendant to this bill of complaint, and required by the process of the court to appear and answer the same, without oath, answers on oath being expressly waived.

(b) That a temporary restraining order or injunction be granted by the court, restraining and enjoining the said defendants, and each of them, and the officers and agents of each of them, from enforcing or taking any steps to enforce the provisions of said proposition voted upon at said election of April 5, 1920, from enforcing or taking any steps to enforce the provisions of said ordinance adopted by said Common Council on February 27, 1920, from issuing or selling or taking any steps to issue or sell the bonds in said ordinance and in said proposition provided for, and from acquiring and removing, causing or ordering the removal of the street railway trackage and equipment of the plaintiff upon the streets and parts of streets described in Paragraphs 11 to 21, both inclusive, of Section I of said ordinance, and referred to in Section 2 of this bill of complaint, and from taking any steps or proceedings to acquire, to remove, or cause the removal from said streets of said street railway trackage and equipment pending the hearing on the merits of this suit.

(c) That a permanent injunction be granted, perpetually enjoining and restraining said defendants, and each of them, and the officers and agents of each of them, from enforcing or taking any steps to enforce the provisions of said proposition voted upon at
said election of April 5, 1920, from enforcing or taking any
41 steps to enforce the provisions of said ordinance adopted by said Common Council on February 27, 1920, from issuing or selling or taking any steps to issue or sell the bonds in said ordinance and in said proposition provided for, and from acquiring and removing, causing or ordering the removal of the street railway trackage and equipment of the plaintiff upon the streets and parts of streets described in Paragraphs 11 to 21, both inclusive, of Section I of said ordinance, and referred to in Section 2 of this bill of complaint, and from taking any steps or proceedings to acquire, to remove, or cause the removal from said streets of said street railway trackage and equipment.

(d) That said proposition and said ordinance be declared invalid and void for any and all purposes.

(e) That the plaintiff have such other and further relief and such different relief in the premises as may be agreeable to equity and good conscience.

DETROIT UNITED RAILWAY,
By FRANK W. BROOKS,
President.

STEVENSON, CARPENTER & BUTZEL,
Attorneys for Plaintiff.
DONNELLY, HALLY, LYSTER & MUNRO AND
H. E. SPALDING,
Of Counsel.

42 EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

On this 10th day of April, A. D. 1920, before the undersigned, a Notary Public in and for said County, personally appeared Frank W. Brooks, who being duly sworn says:

That he is President of the Detroit United Railway and is authorized in its behalf to sign its name to the foregoing Bill of Complaint.

That he has heard read said Bill of Complaint and knows the contents thereof; that the same is true as therein stated except as to matters therein stated upon information and belief, and as to such matters he believes them to be true.

N. J. FLEMING,
Notary Public, Wayne County, Mich.

My commission expires February 14, 1923.

43 EXHIBIT 1.

Whereas, by the terms of a temporary arrangement between the City of Detroit and the Detroit United Railway made August 7, 1913 (J. C. C., 1913, pp. 1125-1127), it was agreed among other things that the Detroit United Railway would construct the proposed Crosstown line on or near Junction Avenue in connection with existing tracks; also connect the Mack Avenue and the Myrtle Street line as hereinbefore proposed; and extend the Kercheval Avenue line easterly to St. Jean Avenue, thence southerly to Jefferson Avenue; and also make the necessary extensions to the new Michigan Central Terminal Station; all to be on streets and locations to be approved by the Common Council; and,

Whereas, the extension to the Michigan Central Terminal Station has been constructed and the Common Council on September 30, 1913 (J. C. C., p. 1385) adopted a resolution for the construction of the Junction Avenue line; and

Whereas, the City of Detroit desires additional trackage to be constructed in connection with the Junction Avenue line upon streets hereinafter named, in lieu of the Mack and Myrtle Street line, and

the Detroit United Railway is willing to construct said trackage under the conditions hereinafter stated; and,

Whereas, the said Common Council has determined upon and fixed the lines or streets upon which said Junction Avenue line and said additional trackage shall be located and constructed, as follows:

44 Double track on Junction from Fort to Michigan, thence west on existing tracks in Michigan Avenue to Thirty-fourth and Thirty-fifth;

Single track on Thirty-fourth, Michigan to Devereaux;

Single track on Devereaux, Thirty-fourth to Thirty-fifth;

Single track on Thirty-fifth, Devereaux to Michigan;

Double track on Thirty-fourth, Devereaux to Warren;

Single track on Thornton, Seebaldt to Warren;

Single track on Vancourt, Warren to Seebaldt;

Single track on Seebaldt, Thornton to Vancourt;

Double track on Seebaldt, Vancourt to Grand River, thence on Grand River Avenue on existing tracks to Lothrop;

Single track on Lothrop, Grand River to Linwood;

Single track on Linwood, Lothrop to Northwestern;

Single track on Northwestern, Linwood to Grand River;

Double track on Linwood, Lothrop to Milwaukee;

Double track on Milwaukee, Linwood to Holden;

Double track on Holden, Milwaukee to Lincoln;

Double track on Lincoln, Holden to Baltimore;

Single track on Lincoln, Baltimore to Milwaukee;

Single track on Lincoln, Baltimore to Milwaukee;

Single track on Baltimore, Lincoln to Brush;

Single track on Brush, Baltimore to Milwaukee;

Single track on Milwaukee, Brush to Lincoln;

45 Double track on Milwaukee, Brush to Mt. Elliott;

Double track on Mt. Elliott, Milwaukee to Harper; to the end that a double track system with cars running in each direction may be operated from the intersection of Junction Avenue and Fort Street to the intersection of Mt. Elliott and Harper Avenue;

Now, therefore, be it resolved, that consent, permission and authority is hereby granted to the Detroit United Railway to enter upon said above named streets and avenues and construct thereon a street railroad, with all necessary side tracks, turn outs, switches, poles, wires and overhead power equipment, and connect the same and operate its cars on said streets and avenues in connection with those parts of its existing tracks above described under the same terms and conditions under and by virtue of which it is operating that portion of its system constructed under authority of the said Hamilton Boulevard extension above referred to, except as otherwise provided in this resolution, and in the agreement of August 7th, 1913.

And be it further, Resolved, That the adoption and acceptance of this resolution shall release the Company from its obligation to construct the Mack avenue and Myrtle street line contained in the agreement of August 7th, 1913, and will also be deemed a withdrawal of

the Company's proposal to the Public Utilities Committee of the Common Council of the City of Detroit to extend the Kercheval Avenue line easterly of St. Jean avenue;

And be it further, Resolved, that the work herein authorized shall be started at once and pushed to completion without interruption;

46 Provided, however, that any delay caused by court proceedings, the inability of the Company to obtain necessary funds for constructing the work, or other causes beyond the control of the Company shall not be interruption within the meaning of this paragraph;

And be it further resolved and understood that the City of Detroit shall be lawfully authorized to engage in the ownership and operation of street railways and shall so engage in such ownership and operation and shall desire to operate a part of its system over said streets, it shall purchase the tracks and equipment constructed under this consent together with the equipment necessarily purchased and acquired by said Company for the operation of said cars over such additional tracks, and shall pay therefor a sum of money equal to the cost thereof less depreciation to be ascertained at the time of purchase thereof by the City, the sum to be agreed upon by the parties hereto, or if they shall fail to agree, the said sum shall be determined by a Board of Arbitration, one member of which shall be selected by the Company, another by the Mayor of City of Detroit, and the third by the two thus chosen, and that the decision of said Board or a majority thereof shall be final; Provided, that the Board of Street Railway Commissioners of the City of Detroit or any member thereof shall have the supervision of the construction of said tracks and shall have free access to the books and vouchers of said Company for the purpose of ascertaining the cost of said tracks and construction, together with any other information in whatever form it may be which said street railway company may have which shows the cost of such construction.

And be it further resolved and understood that said Railway Company by its acceptance hereof gains no term rights in said streets by reason of installing the equipment herein permitted, and that
47 the Council or the people of the City of Detroit at their pleasure or caprice may revoke the permit hereby granted, and said Company will forthwith remove from the streets the property permitted to be placed therein by it under this grant.

It is further understood and agreed between the said company and the Common Council of the City of Detroit that the making of this grant and the acceptance thereof by said Company shall not be deemed to be a waiver of any of the rights of said City of Detroit or of said Railway with reference to the construction, maintenance and operation of any lines or railway or street railway tracks now owned, maintained and operated in said city and that each party hereby saves and reserves all its rights whatever they may be the same as though this grant had not been made or accepted.

And be it further resolved that in connection with this permit the company will put into effect the rates of fare as provided in the resolution of August 7, 1913, as follows:

(1) Seven tickets for twenty-five cents (25c) each of which tickets shall be good for a ride for any distance in one direction over said tracks hereby authorized during 24 hours of the day;

(2) Upon the payment of the fare at the rate of seven tickets for twenty-five cents or five cent (5c) fare, a transfer shall on demand be issued to any connecting or intersecting lines according to the usual custom;

(3) The existing provisions now in force on other lines for workmen's tickets, so called eight for twenty-five cents, shall also be in force on this line;

(4) A single cash fare shall be five cents (5c) with all existing transfer privileges.

48 & 49 And be it further resolved that the agreement of August 7, 1913, hereinbefore referred to, shall remain in full force and effect except as herein modified.

And be it further resolved that the resolution of September 30, 1913 (J. C. C. 1913, p. 1384) is hereby rescinded.

And be it further resolved that this permit is void if not accepted within ten days after its approval by the Mayor.

(Here follows map marked p. 48.)

EXHIBIT 3.

An Ordinance relative to acquiring, owning, maintaining and operating a street railway system upon the surface of the streets, avenues and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits that the public convenience may require for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof, within and without its corporate limits, and to submit to the electors of said City of Detroit a proposition to authorize and empower the City of Detroit to acquire, own, maintain and operate a street railway system, and to borrow money upon the credit of the City of Detroit to an amount not to exceed Fifteen Million (\$15,000,000.00) Dollars by the issuance of its public utility bonds therefor, and to call a special election to vote thereon.

It is hereby ordained by the people of the City of Detroit:

Section 1. That the Common Council of the City of Detroit hereby declare a public improvement to be necessary in the
50 City of Detroit in connection with the supplying of transportation to the City of Detroit and the inhabitants thereof upon the surface of the streets, avenues and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, and to the end thereof hereby declare it necessary that the Board of Street Railway Commissioners proceed and the said Board of Street Railway Commissioners is hereby authorized and directed to proceed as soon as practicable to acquire, own, maintain and operate for and in behalf of the said City of Detroit a street railway system upon the surface of the streets, avenues and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, as herein designated, to-wit:

Class "A" Lines.

(1) A double track street railway commencing at the intersection of Mack Avenue with Gratiot Avenue, thence westerly on Mack Avenue to Riopelle Street; thence a double track southerly on Riopelle Street to Rowena Street; thence a single track southerly on Riopelle Street to Eliot Street; thence westerly a single track on Eliot Street to St. Antoine Street; also a single track from the intersection of Rowena Street and Riopelle Street, westerly on Rowena Street to St. Antoine Street; thence a single track on St. Antoine Street southerly to Eliot Street; thence a double track on Eliot Street westerly to Brush Street; thence a double track southerly and diagonally across Brush Street on Eliot Street to John R. Street; thence
51 a single track on Eliot Street westerly and across Woodward Avenue to Stimson Avenue; thence westerly on Stimson Avenue a single track to Cass Avenue; thence northerly a

single track on Cass Avenue to Davenport Street; also a single track from the intersection of Eliot Street and John R. Street, northerly on John R. Street, to Rowena Street; thence westerly; a single track on Rowena Street across Woodward Avenue to Davenport Street and westerly on Davenport Street to Cass Avenue; thence northerly, a double track on Cass Avenue to Selden Avenue; thence westerly, a double track on Selden Avenue to Lincoln Avenue; thence northerly a double track on Lincoln Avenue to Canfield Avenue West; thence westerly on Canfield Avenue West, a double track to Grand River Avenue; thence a double track on and across Grand River Avenue to Buchanan Street; thence westerly a double track on Buchanan Street to Scotten Avenue; thence a double track northerly on Scotten Avenue to Buchanan Street; thence westerly, a double track on Buchanan Street to Thirty-fifth Street.

(2) A double track street railway on McGraw Avenue commencing at its intersection with Junction Avenue, thence easterly on McGraw Avenue to Linwood Avenue; thence northerly a double track on Linwood Avenue to Ferry Park Avenue.

(3) A double track street railway commencing at the intersection of Moran Street with Milwaukee Avenue East; thence southerly on Moran Street to Palmer Avenue East; also commencing at the intersection of Van Dyke Avenue with Palmer Avenue East; thence westerly a double track on Palmer Avenue East to McDougall Avenue; thence southerly on McDougall Avenue a double track from

52 Palmer Avenue East to Charlevoix Avenue; thence easterly on Charlevoix Avenue, a double track to Crane Avenue; thence southerly on Crane Avenue a double track to Charlevoix Avenue; thence continuing easterly a double track on Charlevoix Avenue to Pennsylvania Avenue; thence northerly on Pennsylvania Avenue a double track to Charlevoix Avenue; thence continuing easterly a double track on Charlevoix Avenue to St. Clair Avenue; thence a double track northerly on St. Clair Avenue to Charlevoix Avenue; thence easterly a double track on Charlevoix Avenue to Alter Road; also commencing at the intersection of Harper Avenue and Van Dyke Avenue; thence southerly a double track on Van Dyke Avenue to Jefferson Avenue East; thence westerly a single track on Jefferson Avenue East to Helen Avenue; also a double track westerly on Lafayette Avenue East from Baldwin Avenue to Van Dyke Avenue.

(4) A double track street railway commencing at the intersection of Joy Road with Grand River Avenue, thence easterly on Joy Road to Linwood Avenue; thence southerly a double track on Linwood Avenue to Clairmount Avenue; thence easterly on Clairmount Avenue a double track to Woodward Avenue, thence diagonally across Woodward Avenue to Owen Avenue; thence easterly, a double track on Owen Avenue to Russell Street; thence southerly a double track on Russell Street to Milwaukee Avenue East.

(5) A double track street railway commencing at the intersection of Petoskey Avenue with Joy Road; thence northerly on Petoskey

Avenue to Davison Avenue; also commencing from the intersection of Potoskey Avenue and Davison Avenue a double track easterly on Davison Avenue to Twelfth Street; thence southerly on Twelfth Street a double track to Elmhurst Avenue.

53 (6) A double track street railway commencing at the intersection of Burlingame Avenue with Twelfth Street; thence easterly on Burlingame Avenue to its intersection with Hamilton Boulevard.

(7) A single track street railway commencing at the intersection of Kulick Avenue with Junction Avenue; thence westerly on Kulick Avenue to Thirty-fifth Street, thence northerly on Thirty-fifth Street a single track to and across Michigan Avenue.

(8) A double track street railway commencing at the intersection of Artillery Avenue and Jefferson Avenue West, thence northerly on Artillery Avenue to Fort Street West.

(9) A single track street railway commencing at the intersection of Duncan Street with Van Dyke Avenue, thence easterly on Duncan Street to Crane Avenue, thence northerly a single track on Crane Avenue to Harper Avenue; thence easterly from Crane Avenue on Harper Avenue a double track to and across Gratiot Avenue; also a single track commencing at the intersection of Crane Avenue and Harper Avenue, thence westerly on Harper Avenue to Van Dyke Avenue; also a double track commencing at the intersection of Warren Avenue East with Bewick Avenue, thence westerly on Warren Avenue East to Pennsylvania Avenue; thence a double track commencing at the intersection of Pennsylvania Avenue with Warren Avenue East, northerly on Pennsylvania Avenue to Gratiot Avenue; also single tracks connecting tracks on Pennsylvania Avenue with tracks on Harper Avenue through first two alleys approximately parallel with and southeast of Gratiot Avenue.

54 (10) A double track street railway commencing at the intersection of Twelfth Street with Davison Avenue, thence easterly on Davison Avenue to its intersection with the City Limits of the City of Highland Park, thence continuing on Davison Avenue easterly to Hamilton Boulevard; thence diagonally across Hamilton Boulevard continuing on Davison Avenue to Woodward Avenue; thence easterly across Woodward Avenue to Windemere Avenue and easterly on Windemere Avenue to John R. Street; also a double track commencing at the intersection of John R. Street with Victor Avenue in Highland Park, thence southerly on John R. Street to its intersection with the southerly city limits of the City of Highland Park; thence continuing on John R. Street southerly a double track to Holbrook Avenue; thence diagonally across Holbrook Avenue to John R. Street, and thence continuing southerly on John R. Street to its intersection with Baltimore Avenue East.

(11) A double track street railway commencing at the intersection of Artillery Avenue with West Jefferson Avenue, thence easterly on West Jefferson Avenue to Clark Street; thence a double

track northerly on Clark Street to Fort Street West; also a double track commencing at the intersection of Artillery Avenue with Fort Street West, thence easterly on West Fort street to and across Woodward Avenue to Cadillac Square thence a single track on the southerly part of Cadillac Square to Randolph Street; also a single track on the northerly part of Cadillac Square from Woodward Avenue to Bates Street; thence northerly a single track on Bates Street from Cadillac Square to Randolph Street; also single track on Randolph Street from Cadillac Square to Monroe Avenue; also a single track easterly on Monroe Avenue from Randolph Street to Elmwood Avenue; thence a single track on Elmwood Avenue southerly from Monroe Avenue to Lafayette Avenue East; thence a double track on Lafayette Avenue East from Elmwood Avenue easterly to Baldwin Avenue; also a single track on Helen Avenue, northerly from Jefferson Avenue East to Lafayette Avenue East; also a single track westerly from Elmwood Avenue to Randolph Street on Lafayette Avenue East.

(12) A double track street railway commencing at the foot of Woodward Avenue, north of the Detroit River, thence northerly on Woodward Avenue to its intersection with Milwaukee Avenue.

(13) A double track street railway commencing at the intersection of Twelfth Street with Ferry Park Avenue, thence northerly on Twelfth Street to Elmhurst Avenue.

(14) A double track Street railway commencing at the intersection of Warren Avenue West with Junction Avenue, thence westerly on Warren Avenue West, to the present westerly city limits.

(15) A double track street railway commencing at the intersection of Junction Avenue with West Fort Street, thence northerly on Junction Avenue to and across Michigan Avenue; thence a single track northerly on Junction Avenue from Michigan Avenue to Devereaux Street; also a single track northerly on Thirty-fifth Street from Michigan Avenue to Devereaux Street; thence a single track easterly on Devereaux Street to Junction Avenue; thence a double track northerly on Junction Avenue from Devereaux Street to Warren Avenue West.

56 (16) A double track street railway commencing at the intersection of Epworth Boulevard with Warren Avenue West, thence northerly on Epworth Boulevard to Dailey Avenue; thence a double track easterly on Daily Avenue from Epworth Boulevard to Highfield Avenue; thence a double track northeasterly on Highfield Avenue to and across Grand River Avenue to Joy Road.

(17) A double track street railway commencing at the intersection of Ferry Park Avenue with Fourteenth Street, thence easterly on Ferry Park Avenue to Holden Avenue; thence a double track on Holden Avenue southeasterly to Lincoln Avenue; thence a double track northeasterly on Lincoln Avenue to Baltimore Avenue West; thence continuing a single track on Lincoln Avenue northeasterly from Baltimore Avenue West to Milwaukee Avenue West; also a

single track easterly on Baltimore Avenue West across Woodward Avenue to Brush Street; thence a single track northerly on Brush Street from Baltimore Avenue East to Milwaukee Avenue East; also a single track from the intersection of Lincoln Avenue and Milwaukee Avenue West, easterly on Milwaukee Avenue West to and across Woodward Avenue to Brush Street; thence a double track easterly on Milwaukee Avenue East to Mt. Elliott Avenue; thence a double track on Mt. Elliott Avenue from Milwaukee Avenue East to Harper Avenue.

(18) A double track street railway commencing at the intersection of Ferry Park Avenue, with Linwood Avenue, thence northerly on Linwood Avenue to Joy Road; also commencing at the intersection of Ferry Park Avenue with Linwood Avenue, thence easterly on Ferry Park Avenue to Fourteenth Street.

57 (19) A double track street railway commencing at the intersection of Greenwood Avenue with Holden Avenue, thence northerly on Greenwood Avenue to and across the West Grand Boulevard to Hamilton Boulevard; thence continuing a double track northerly on Hamilton Boulevard to a point where the city limits of the City of Detroit intersect the city limits of the City of Highland Park.

(20) A double track street railway commencing at the intersection of Harper Avenue with Gratiot Avenue, thence easterly on Harper Avenue to Montclair Avenue; thence a double track southerly on Montclair Avenue from Harper Avenue to Shoemaker Avenue; thence a double track easterly on Shoemaker Avenue from Montclair Avenue to St. Jean Avenue; thence a double track southerly on St. Jean Avenue from Shoemaker Avenue to Jefferson Avenue East; also a double track commencing at the intersection of Warren Avenue East with St. Jean Avenue, thence westerly on Warren Avenue East to Bewick Avenue.

(21) A double track street railway commencing at the intersection of Kercheval Avenue and St. Jean Avenue, thence easterly on Kercheval Avenue to Lycaste Avenue; thence a single track southerly on Lycaste Avenue to Jefferson Avenue East; thence a single track on Jefferson Avenue East, easterly to Hart Avenue, thence a single track northerly on Hart Avenue to Kercheval Avenue; thence a single track westerly on Kercheval Avenue to Lycaste Avenue.

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Class "B" Lines.

(22) A double track street railway on Tireman Avenue commencing at the intersection of Epworth Boulevard with Tireman Avenue; thence westerly on Tireman Avenue to Wyoming Avenue (sometimes called Snyder Road); thence southerly a double track in the Township of Springwells on Wyoming Avenue to Warren Avenue West; also a double track from the intersection of the present westerly city limits with Warren Avenue West, thence westerly, through the Township of Springwells, a double track on

Warren Avenue West to Miller Road; thence southerly a double track on Miller Road to a point south of the Michigan Central Railway tracks to the proposed New Miller Road; thence southeasterly a double track on New Miller Road to Dix Avenue; also a double track commencing at the intersection of Livernois Avenue with Tireman Avenue, thence northerly on Livernois Avenue to Fenkell Avenue; thence easterly, a double track on Fenkell Avenue to Twelfth Street; thence southerly a double track on Twelfth Street from Fenkell Avenue to Davison Avenue; also commencing at the intersection of Joy Road and Linwood Avenue, a double track northerly on Linwood Avenue to Fenkell Avenue; also a double track commencing at the intersection of Davison Avenue with Livernois Avenue, thence easterly on Davison Avenue to Petoskey Avenue.

(23) A double track street railway commencing at the intersection of Holbrook Avenue with Russell Street, thence easterly on Holbrook Avenue through Hamtramck to Conant Avenue; thence southerly, a double track on Conant Avenue to Mt. Elliott Avenue in
59 Detroit; thence a double track across Mt. Elliott Avenue, easterly on Legrand Avenue to Ackley Avenue; thence southerly a double track on Ackley Avenue to Strong Avenue; thence easterly a double track on Strong Avenue to Helen Avenue; thence southerly on Helen Avenue a single track from Strong Avenue to Duncan Street; thence easterly, a single track on Duncan Street to Frontenac Boulevard; also a single track from Helen Avenue to Frontenac Boulevard, easterly on Strong Avenue; thence southerly on Frontenac Boulevard a single track to Duncan Street from Strong Avenue; thence easterly on Duncan Street a double track to Van Dyke Avenue.

(24) A double track street railway commencing at the intersection of Pennsylvania Avenue with Warren Avenue East, thence southerly on Pennsylvania Avenue to Jefferson Avenue East; thence a single track on Jefferson Avenue East, easterly to Cadillac Avenue; thence northerly a single track on Cadillac Avenue to St. Paul Avenue; thence westerly a single track on St. Paul Avenue to Pennsylvania Avenue.

(25) A double track street railway on Central Avenue from its intersection with Ferndale Avenue to Cyprus Street; thence a single track on Central Avenue from Cyprus Street to McGraw Avenue; thence a double track, easterly, on McGraw Avenue as extended, to Chopin Avenue; thence northerly a double track on Chopin Avenue to Vernor Avenue; thence easterly, a double track on Vernor Avenue to Wetherby Avenue thence northerly, a double track on Wetherby Avenue to Tireman Avenue; also a single track on Cyprus Street, westerly, from Central Avenue to Burke Avenue; thence a single track on Burke Avenue from Cyprus Street northerly to McGraw Avenue; thence a single track easterly on McGraw Avenue to Central Avenue.

(26) A double track street railway commencing at the intersection of Livernois Avenue with Fenkell Avenue, thence northerly on Livernois Avenue to Eight Mile Road; thence easterly a double track on Eight Mile Road from Livernois Avenue to Woodward Avenue.

(27) A double track street railway commencing at the intersection of Plymouth Road with Livernois Avenue, thence westerly, on Plymouth Road to the present westerly city limits.

(28) A double track street railway commencing at the intersection of Linwood Avenue with Fenkell Avenue, thence northerly on Linwood Avenue to Six Mile Road (sometimes called Palmer Boulevard West); also commencing at the intersection of Livernois

61 Avenue with Six Mile Road, thence, easterly, a double track on Six Mile Road across Woodward Avenue, continuing on Six Mile Road (sometimes called Palmer Boulevard East) to Conant Avenue; thence, southerly a double track on Conant Avenue through Hamtramck to Holbrook Avenue; also commencing at the intersection of Six Mile Road with Conant Avenue, a double track, easterly, on Six Mile Road to Connors Avenue; thence southerly, a double track on Connors Avenue to Essex Avenue; thence a single track on Essex Avenue to Navahoe Avenue; thence a single track, northerly, on Navahoe Avenue to Freud Avenue; thence westerly a single track on Freud Avenue to Connors Avenue.

(29) A double track street railway commencing at the intersection of Shoemaker Avenue with St. Jean Avenue, thence easterly, on Shoemaker Avenue to Connors Avenue; also a double track street railway commencing at the intersection of St. Jean Avenue with Warren Avenue East, thence easterly, on Warren Avenue East as extended (also called Sunderland Road and Warren Boulevard), to its intersection with the present easterly city limits at Cadieux Road.

(30) A double track street railway commencing at the intersection of Alter Road with Charlevoix Avenue, thence, northerly, on Alter Road to Harper Avenue; thence a double track westerly on Harper Avenue from Alter Road to Montclair Avenue; also commencing at the intersection of Van Dyke Avenue with Harper Avenue, thence, a single track northerly on Van Dyke Avenue from Harper Avenue to the Seven Mile Road, together with all necessary and convenient turnouts, turntables, curves, sidetracks, switches, connections, poles, wires and overhead power equipment in and

62 along the streets, avenues and public places herein designated so as to make a complete street railway system; and to make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said Board of Street Railway Commissioners shall construct, own, maintain and operate in said City of Detroit for said City of Detroit and within a distance of ten miles from any portion of its corporate limits as aforesaid, a system of street railways upon the surface of the streets, avenues and public places herein

designated, and, further said Board of Street Railway Commissioners are hereby authorized for and in behalf of the City of Detroit to purchase or construct such car houses, power houses, shops, stations and such other buildings as may be required to maintain and operate said street railway system.

Section 2. That in order to authorize and empower the City of Detroit to acquire, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places of the City of Detroit, and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, as herein designated, for the purpose of supplying transportation to the City of Detroit and to the inhabitants thereof, and in order further to authorize and empower the City of Detroit to borrow money on the credit of the City of Detroit by the issuance of the public utility bonds of the City of Detroit in an amount not to exceed Fifteen Million (\$15,000,000) Dollars for the purpose of acquiring and owning said street railway system, this body, being the legislative body of the City of Detroit, hereby propose that the following
63 proposition be submitted to the qualified electors of the City of Detroit, both male and female, at a special election to be held in said City on Monday, the 5th day of April, A. D. 1920, which proposition shall be printed on the ballots in words and figures as follows:

Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places of the City of Detroit, and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof, as hereinafter designated, to wit:

Class "A" Lines.

(1) A double track street railway commencing at the intersection of Mack Avenue with Gratiot Avenue, thence westerly on Mack Avenue to Riopelle Street; thence a double track southerly on Riopelle Street to Rowena Street; thence a single track southerly on Riopelle Street to Eliot Street; thence westerly, a single track on Eliot Street to St. Antoine Street; also a single track from the intersection of Rowena Street and Riopelle Street, westerly on Rowena Street to St. Antoine Street; thence a single track on St. Antoine Street southerly to Eliot Street; thence a double track on Eliot Street westerly to Brush Street; thence a double track southerly and diagonally across Brush Street on Eliot Street to John R Street; thence a single track on Eliot Street westerly and across Woodward Avenue to Stimson Avenue; thence westerly on Stimson Avenue a single track to Cass Avenue; thence northerly a single track
64 on Cass Avenue to Davenport Street; also a single track from the intersection of Eliot Street and John R Street; northerly on John R Street to Rowena Street; thence westerly, a single track

on Rowena Street across Woodward Avenue to Davenport Street and westerly on Davenport Street to Cass Avenue; thence northerly, a double track on Cass Avenue to Selden Avenue; thence westerly, a double track on Selden Avenue to Lincoln Avenue; thence northerly, a double track on Lincoln Avenue to Canfield Avenue West; thence westerly on Canfield Avenue West, a double track to Grand River Avenue; thence a double track on and across Grand River Avenue to Buchanan Street; thence westerly a double track on Buchanan Street to Scotten Avenue; thence a double track northerly on Scotten Avenue to Buchanan Street; thence westerly, a double track on Buchanan Street to Thirty-Fifth Street.

(2) A double track street railway on McGraw Avenue, commencing at its intersection with Junction Avenue; thence easterly on McGraw Avenue to Linwood Avenue; thence northerly a double track on Linwood Avenue to Ferry Park Avenue.

(3) A double track street railway commencing at the intersection of Moran Street with Milwaukee Avenue East; thence southerly on Moran Street to Palmer Avenue East; also commencing at the intersection of Van Dyke Avenue with Palmer Avenue East; thence westerly a double track on Palmer Avenue East to McDougall Avenue; thence southerly on McDougall Avenue a double track from Palmer Avenue East to Charlevoix Avenue; thence easterly on Charlevoix Avenue, a double track to Crane Avenue; thence southerly on Crane Avenue a double track to Charlevoix Avenue, thence continuing easterly a double track on Charlevoix Avenue to Pennsylvania Avenue; thence northerly on Pennsylvania Avenue a double track to Charlevoix Avenue; thence continuing easterly a double track on Charlevoix Avenue to St. Clair Avenue; thence a double track northerly on St. Clair Avenue to Charlevoix Avenue; thence easterly a double track on Charlevoix Avenue to Alter Road; also commencing at the intersection of Harper Avenue and Van Dyke Avenue; thence southerly a double track on Van Dyke Avenue to Jefferson Avenue East; thence westerly a single track on Jefferson Avenue East to Helen Avenue; also a double track easterly on Lafayette Avenue East from Baldwin Avenue to Van Dyke Avenue.

(4) A double track street railway commencing at the intersection of Joy Road with Grand River Avenue; thence easterly on Joy Road to Linwood Avenue; thence southerly a double track on Linwood Avenue to Clairmont Avenue; thence easterly on Clairmont Avenue a double track to Woodward Avenue; thence diagonally across Woodward Avenue to Owen Avenue; thence easterly a double track on Owen Avenue to Russell Street; thence southerly a double track on Russell Street to Milwaukee Avenue East.

(5) A double track street railway commencing at the intersection of Petoskey Avenue with Joy Road; thence northerly on Petoskey Avenue to Davison Avenue; also commencing from the intersection of Petoskey Avenue and Davison Avenue, a double track east-

erly on Davison Avenue to Twelfth Street; thence southerly on Twelfth Street a double track to Elmhurst Avenue.

(6) A double track street railway commencing at the intersection of Burlingame Avenue with Twelfth Street; thence easterly on Burlingame Avenue to its intersection with Hamilton Boulevard.

66 (7) A single track street railway commencing at the intersection of Kulick Avenue with Junction Avenue; thence westerly on Kulick Avenue to Thirty-Fifth Street; thence northerly on Thirty-Fifth Street a single track to and across Michigan Avenue.

(8) A double track street railway commencing at the intersection of Artillery Avenue and Jefferson Avenue West; thence northerly on Artillery Avenue to Fort Street West.

(9) A single track street railway commencing at the intersection of Duncan Street with Van Dyke Avenue; thence easterly on Duncan Street to Crane Avenue; thence northerly a single track on Crane Avenue to Harper Avenue; thence easterly from Crane Avenue on Harper Avenue a double track to and across Gratiot Avenue; also a single track commencing at the intersection of Crane Avenue and Harper Avenue; thence westerly on Harper Avenue to Van Dyke Avenue; also a double track commencing at the intersection of Warren Avenue East with Bewick Avenue; thence westerly on Warren Avenue East to Pennsylvania Avenue; thence a double track commencing at the intersection of Pennsylvania Avenue with Warren Avenue East; northerly on Pennsylvania Avenue to Gratiot Avenue; also single tracks connecting tracks on Harper Avenue through first two alleys approximately parallel with and southeast of Gratiot Avenue.

(10) A double track street railway commencing at the intersection of Twelfth Street with Davison Avenue; thence easterly on Davison Avenue to its intersection with the City Limits of the City of Highland Park; thence continuing on Davison Avenue easterly to Hamilton Boulevard; thence diagonally across Hamilton Boulevard continuing on Davison Avenue to Woodward Avenue;

67 thence easterly across Woodward Avenue to Windemere Avenue and easterly on Windemere Avenue to John R. Street; also a double track commencing at the intersection of John R. Street with Victor Avenue in Highland Park; thence southerly on John R. Street to its intersection with the southerly City Limits of the City of Highland Park; thence continuing on John R. Street southerly a double track to Holbrook Avenue; thence diagonally across Holbrook Avenue to John R. Street and thence continuing southerly on John R. Street to its intersection with Baltimore Avenue East.

(11) A double track street railway commencing at the intersection of Artillery Avenue with West Jefferson Avenue; thence easterly on West Jefferson Avenue to Clark Street; thence a double track northerly on Clark Street to Fort Street West; also a double track

commencing at the intersection of Artillery Avenue with Fort Street West; thence easterly on West Fort Street to and across Woodward Avenue to Cadillac Square; thence a single track on the southerly part of Cadillac Square to Randolph Street; also a single track on the northerly part of Cadillac Square from Woodward Avenue to Bates Street; thence northerly a single track on Bates Street from Cadillac Square to Randolph Street; also a single track on Randolph Street from Cadillac Square to Monroe Avenue; also a single track easterly on Monroe Avenue from Randolph Street to Elmwood Avenue; thence a single track on Elmwood Avenue southerly from Monroe Avenue to Lafayette Avenue East; thence a double track on Lafayette Avenue East from Elmwood Avenue easterly to Baldwin Avenue; also a single track on Helen Avenue, northerly from Jefferson Avenue East to Lafayette Avenue East; also a single track westerly from Elmwood Avenue to Randolph Street on Lafayette Avenue East.

(12) A double track street railway commencing at the foot of Woodward Avenue north of the Detroit River; thence northerly on Woodward Avenue to its intersection with Milwaukee Avenue.

(13) A double track street railway commencing at the intersection of Twelfth Street with Ferry Park Avenue; thence northerly on Twelfth Street to Elmhurst Avenue.

(14) A double track street railway commencing at the intersection of Warren Avenue West with Junction Avenue; thence westerly on Warren Avenue West to the present westerly City Limits.

(15) A double track street railway commencing at the intersection of Junction Avenue with West Fort Street; thence northerly on Junction Avenue to and across Michigan Avenue; thence a single track northerly on Junction Avenue from Michigan Avenue to Devereaux Street; also a single track northerly on Thirty-fifth Street from Michigan Avenue to Devereaux Street; thence a single track easterly on Devereaux Street to Junction Avenue; thence a double track northerly on Junction Avenue from Devereaux Street to Warren Avenue West.

(16) A double track street railway commencing at the intersection of Epworth Boulevard with Warren Avenue West; thence northerly on Epworth Boulevard to Dailey Avenue; thence a double track easterly on Dailey Avenue from Epworth Boulevard to Highfield Avenue; thence a double track northeasterly on Highfield Avenue to and across Grand River Avenue to Joy Road.

(17) A double track street railway commencing at the intersection of Ferry Park Avenue with Fourteenth Street; thence easterly on Ferry Park Avenue to Holden Avenue; thence a double track on Holden Avenue southeasterly to Lincoln Avenue; thence a double track northeasterly on Lincoln Avenue to Baltimore Avenue West; thence continuing a single track on Lincoln Avenue northeasterly from Baltimore Avenue West to Milwaukee Avenue

West; also a single track easterly on Baltimore Avenue West across Woodward Avenue to Brush Street; thence a single track northerly on Brush Street from Baltimore Avenue East to Milwaukee Avenue East; also a single track from the intersection of Lincoln Avenue and Milwaukee Avenue West; easterly on Milwaukee Avenue West to and across Woodward Avenue to Brush Street; thence a double track easterly on Milwaukee Avenue East to Mt. Elliott Avenue; thence a double track on Mt. Elliott Avenue from Milwaukee East to Harper Avenue.

(18) A double track street railway commencing at the intersection of Ferry Park Avenue with Linwood Avenue; thence northerly on Linwood Avenue to Joy Road; also commencing at the intersection of Ferry Park Avenue with Linwood Avenue; thence easterly on Ferry Park Avenue to Fourteenth Street.

(19) A double track street railway commencing at the intersection of Greenwood Avenue with Holden Avenue; thence northerly on Greenwood Avenue to and across the West Grand Boulevard to Hamilton Boulevard; thence continuing a double track northerly on Hamilton Boulevard to a point where the City Limits of the City of Detroit intersect the City Limits of the City of Highland Park.

70 (20) A double track street railway commencing at the intersection of Harper Avenue with Gratiot Avenue; thence easterly on Harper Avenue to Montclair Avenue; thence a double track southerly on Montclair Avenue from Harper Avenue to Shoemaker Avenue; thence a double track easterly on Shoemaker Avenue from Montclair Avenue to St. Jean Avenue; thence a double track southerly on St. Jean Avenue from Shoemaker Avenue to Jefferson Avenue East; also a double track commencing at the intersection of Warren Avenue East with St. Jean Avenue; thence westerly on Warren Avenue East to Bewick Avenue.

(21) A double track street railway commencing at the intersection of Kercheval Avenue and St. Jean Avenue; thence easterly on Kercheval Avenue to Lycaste Avenue; thence a single track southerly on Lycaste Avenue to Jefferson Avenue East; thence a single track on Jefferson Avenue East easterly to Hart Avenue; thence a single track northerly on Hart Avenue to Kercheval Avenue; thence a single track westerly on Kercheval Avenue to Lycaste Avenue.

71

Class "B" Lines.

(22) A double track street railway on Tireman Avenue commencing at the intersection of Epworth Boulevard with Tireman Avenue; thence westerly on Tireman Avenue to Wyoming Avenue (sometimes called Snyder Road); thence southerly a double track in the Township of Springwells on Wyoming Avenue to Warren Avenue West; also a double track from the intersection of the present westerly City Limits with Warren Avenue West; thence westerly through the Township of Springwells, a double track on Warren

Avenue West to Miller Road; thence southerly a double track on Miller Road to a point south of the Michigan Central Railway tracks to the proposed new Miller Road; thence southeasterly a double track on the New Miller Road to Dix Avenue; also a double track commencing at the intersection of Livernois Avenue with Tireman Avenue; thence northerly on Livernois Avenue to Fenkell Avenue; thence easterly a double track on Fenkell Avenue to Twelfth Street; thence southerly a double track on Twelfth Street from Fenkell Avenue to Davison Avenue; also commencing at the intersection of Joy Road and Linwood Avenue, a double track northerly on Linwood Avenue to Fenkell Avenue; also a double track commencing at the intersection of Davison Avenue with Livernois Avenue; thence easterly on Davison Avenue to Petoskey Avenue.

(23) A double track street railway commencing at the intersection of Holbrook Avenue with Russell Street; thence easterly on Holbrook Avenue through Hamtramck to Conant Avenue; thence southerly a double track on Conant Avenue to Mt. Elliott Avenue in Detroit; thence a double track across Mt. Elliott Avenue, easterly on Legrand Avenue to Ackley Avenue; thence southerly a double track on Ackley Avenue to Strong Avenue; thence easterly a double track on Strong Avenue to Helen Avenue; thence southerly on Helen Avenue, a single track from Strong Avenue to Duncan Street; thence easterly, a single track on Duncan Street to Frontenac Boulevard; also a single track from Helen Avenue to Frontenac Boulevard, easterly, on Strong Avenue; thence southerly on Frontenac Boulevard, a single track to Duncan Street from Strong Avenue; thence easterly on Duncan Street, a double track to Van Dyke Avenue.

(24) A double track street railway commencing at the intersection of Pennsylvania Avenue with Warren Avenue East, thence southerly on Pennsylvania Avenue to Jefferson Avenue East; thence a single track on Jefferson Avenue East, easterly to Cadillac Avenue; thence northerly a single track on Cadillac Avenue to St. Paul Avenue; thence westerly, a single track on St. Paul Avenue to Pennsylvania Avenue.

73

Class "C" Lines.

(25) A double track street railway on Central Avenue from its intersection with Ferndale Avenue to Cyprus Street; thence a single track on Central Avenue, from Cyprus Street, to McGraw Avenue; thence a double track easterly, on McGraw Avenue as extended, to Chopin Avenue; thence northerly a double track on Chopin Avenue to Vernor Avenue; thence easterly, a double track on Vernor Avenue to Wetherby Avenue; thence northerly, a double track on Wetherby Avenue to Tireman Avenue; also a single track on Cyprus Street, westerly, from Central Avenue to Burke Avenue; thence a single track on Burke Avenue from Cyprus Street northerly to McGraw Avenue; thence a single track easterly on McGraw Avenue to Central Avenue.

(26) A double track street railway commencing at the intersection of Livernois Avenue with Fenkell Avenue, thence northerly on Livernois Avenue to Eight Mile Road; thence easterly a double track on Eight Mile Road from Livernois Avenue to Woodward Avenue.

(27) A double track street railway commencing at the intersection of Plymouth Road with Livernois Avenue, thence, westerly, on Plymouth Road to the present westerly city limits.

(28) A double track street railway commencing at the intersection of Linwood Avenue with Fenkell Avenue; thence northerly on Linwood Avenue to Six Mile Road (sometimes called Palmer Boulevard West); also commencing at the intersection of Livernois Avenue with Six Mile Road, thence, easterly, a double track on Six Mile Road across Woodward Avenue continuing on Six Mile Road (sometimes called Palmer Boulevard East) to Conant Avenue; thence southerly, a double track on Conant Avenue through Hamtramck to Holbrook Avenue; also commencing at the intersection of Six Mile Road with Conant Avenue, a double track, easterly on Six Mile Road to Connors Avenue; thence southerly, a double track on Connors Avenue to Essex Avenue; thence a single track on Essex Avenue to Navahoe Avenue; thence a single track, northerly on Navahoe Avenue to Freud Avenue; thence westerly a single track on Freud Avenue to Connors Avenue.

(29) A double track street railway commencing at the intersection of Shoemaker Avenue with St. Jean Avenue, thence easterly on Shoemaker Avenue to Connors Avenue; also a double track street railway commencing at the intersection of St. Jean Avenue with Warren Avenue, East, thence easterly on Warren Avenue East as extended (also called Sunderland Road and Warren Boulevard) to its intersection with the present Easterly city limits at Cadieux Road.

(30) A double track street railway commencing at the intersection of Alter Road with Charlevoix Avenue, thence northerly on Alter Road to Harper Avenue; thence a double track westerly on Harper Avenue from Alter Road to Montclair Avenue; also commencing at the intersection of Van Dyke Avenue with Harper Avenue; thence a single track northerly on Van Dyke Avenue from Harper Avenue to the Seven Mile Road.

Together with all necessary and convenient turnouts, turntables, curves, side tracks, switches, connections, poles, wires and overhead power equipment in and along the streets, avenues, and public places herein designated so as to make a complete street railway system; and to make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated and to purchase or construct such car houses, power houses, shops, stations and such other buildings as may be required to maintain and operate said street railway system and to

borrow money on the credit of the City of Detroit by the issuance of the public utility bonds of the City of Detroit up to an amount not to exceed Fifteen Million (\$15,000,000.00) Dollars for the purpose of so acquiring and owning said street railway system?

YES ☐

NO ☐

Section 3. That in order to carry out the purposes of this ordinance, this body, being the legislative body of the City of Detroit, hereby declare that a special election of the qualified electors of the City of Detroit, both male and female, shall be held and there shall be submitted to the qualified electors thereof, said proposition to authorize and empower the City of Detroit to acquire, own, maintain and operate said street railway system and to borrow money on the credit of the City of Detroit by the issuance of the public utility bonds of the City of Detroit in a sum not to exceed Fifteen Million (\$15,000,000.00) Dollars for the purpose of acquiring, and owning said street railway system; and that the said special election shall be held on Monday, the Fifth day of April, A. D. 1920, in said

City of Detroit, and that the polls shall be opened at seven 76 o'clock in the forenoon and continue open until eight o'clock in the evening (Detroit official time); and the City Clerk is hereby authorized and directed to give legal notice of said special election and registration thereon; and, further, that the election houses used for the purpose of holding general elections and primary elections are hereby designated as the places to be used for the purpose of said special election, and that the said special election shall be conducted and the returns canvassed as nearly as may be in the manner of any regular election.

Section 4. If any clause in this ordinance shall for any reason be adjudged or decreed to be invalid by any Court of competent jurisdiction, such judgment or decree shall not effect, impair or invalidate the remainder of this ordinance, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which said judgment or decree shall have been rendered.

Section 5. This ordinance is ordered to take effect thirty (30) days after its approval by the mayor.

77

EXHIBIT 4.

At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-eighth day of February, in the year of our Lord one thousand nine hundred and thirteen.

Present: The Honorable Joseph H. Steere, Chief Justice; Joseph B. Moore, Aaron V. McAlvay, Flavius L. Brooke, John W. Stone, Russell C. Ostrander, John E. Bird, Associate Justices.

No. 25063.

THE CITY OF DETROIT, Complainant,

VS.

DETROIT UNITED RAILWAY, Defendant.

This cause coming on to be heard *de novo* upon the pleadings and proofs therein and having been duly argued by counsel and the Court having given due consideration to the same, it is hereby ordered, adjudged and decreed as follows:

1. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets of the City of Detroit, to-wit: On Fort Street west, beginning at Clark Avenue, thence westerly to Artillery Avenue, expired by limitation on July 24, A. D. 1910; and that said Detroit United Railway has no rights or privileges upon or in said streets.

78 2. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets in the City of Detroit, to wit: On Fort Street west, from the west line of the Porter Farm across Woodward Avenue to Cadillac Square; on Cadillac Square (south part) from Woodward Avenue to Randolph Street; on Cadillac Square (north part) from Woodward Avenue to Bates Street; on Bates Street from Cadillac Square to Randolph Street; on Randolph Street from Monroe Avenue to Cadillac Square; on Monroe Avenue from Randolph Street to Elmwood Avenue; on Elmwood Avenue from Monroe Avenue to Champlain Street; on Champlain Street from Randolph to Baldwin Avenue; on Helen Avenue from Jefferson Avenue to Champlain Street, expired by limitation on June 30, A. D. 1910, and that the Detroit United Railway has no rights or privileges upon or in said streets; provided the rights of the defendant, as assignee and successor in title of the Detroit Railway on Bates Street from Cadillac Square to Farmer Street and on Champlain Street from Concord to Field Avenue, shall not be required, impaired or interfered with.

3. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets in the City of Detroit, to wit: on Fort Street west, beginning at a point on said street where the same intersects the west line of the Porter Farm, thence westerly on said Fort Street west to Clarke Avenue, thence southerly on Clarke Avenue to West Jefferson Avenue, thence westerly on said Avenue to a point opposite Fort Wayne, to wit: Artillery Avenue, expired by limitation on June 17, A. D., 1910; and that said Detroit United Railway has no rights or privileges upon or in said streets.

79 4. That the defendant, the Detroit United Railway, refused to accept or to comply with the terms sought to be imposed

by the resolutions of the Common Council of the City of Detroit (of which exhibits T, S and Q, attached to the bill of complaint, are copies) for the operation of its tracks on said streets wherein its rights have expired, as hereinbefore set forth; that, therefore, the terms and conditions of operation stated in said resolutions never became binding upon the defendant; that the defendant company is not liable to make the payments for the use of said streets as required by the terms of said resolutions, or any of them.

5. That by reason of said defendant's refusal to comply with the terms of the resolutions of the Common Council of the City of Detroit (of which T, S and Q set forth in the bill of complaint, are copies) the defendant is without any rights in or to said streets, and it has been and is a trespasser in continuing to occupy them and operate cars thereon.

6. That defendant continues to be the owner of all its property in the public streets used in the maintenance and operation of its railway, and that complainant may by resolution of its Common Council require said defendant to cease the operation of its cars upon and over said streets and to remove therefrom all of said property; that if the complainant shall by resolution of its Common Council, as aforesaid, require and direct the cessation of street railway operation upon said streets, said defendant shall cease said operation within ten days from the time it receives notice of said resolution, unless said resolution prescribes a longer time or said time be extended by said Common Council; that if the complainant shall by resolution

80 of the Common Council require the removal of the defendant's property from said streets, such removal shall be effected by said defendant within ninety days after notice of said resolution, unless said resolution give a longer time or said time be extended by said Common Council by a like resolution. In removing said property from said streets defendant shall not disturb the pavement thereon more than is necessary and shall keep said street open for public travel and shall promptly restore the pavement in fit condition for public travel under the supervision and to the satisfaction of the Department of Public Works of the City of Detroit.

7. It is further decreed that in case of the passage of such resolution, if the defendant shall not cease operation of its cars upon said streets within the time allowed therefor after notice of such resolution or within any extended time that may be allowed, then the Circuit Court of the County of Wayne, in Chancery, to which the case is remanded, upon application of complainant shall forthwith issue its peremptory writ of injunction to enforce the cessation of operation of cars upon said streets, and if the defendant shall not remove all of its property from said streets within the time allowed therefor after notice of such resolution, or within any extended time that may be allowed, then the said Circuit Court in Chancery, upon like application shall forthwith issue its Writ of Assistance to compel and effect the removal of the defendant's property from said street.

8. And it is further decreed that the said complainant shall recover its costs of both courts in this suit to be taxed against said defendant, and that it have execution therefor.

81

EXHIBIT 4-a.

Whereas, The Mayor and Common Council on the 5th day of August, received from the Detroit United Railway the following letter:

"To the Honorable Mayor and Common Council of the City of Detroit:

"GENTLEMEN:

Acting for the Detroit United Railway, I have had a full conference with James Couzens, Esq., of the street railway commission, for the purpose and in an effort to reach an understanding or basis upon which an adjustment of the differences between the city and the company could be reached. As a result of such conference, the Detroit United Railway is prepared to agree as follows:

First. On or before August 15th, we will put in effect rates of fares as follows:

(1) Seven tickets for 25 cents, good on all lines in the City of Detroit and within the one-fare zone, so-called, during 24 hours of the day.

(2) Upon the payment of a seven-for-a-quarter ticket or a five-cent fare, a transfer shall be issued to any connecting or intersecting line according to the existing custom.

(3) The existing provisions for workingmen's tickets—8 tickets for 25 cents—to remain unchanged.

(4) The rates of fare now in effect on the Detroit Railway lines to remain unchanged, except that payment of a seven-for-a-quarter ticket shall be received for a fare, including a transfer on any other line.

82 (5) A single cash fare shall be five cents.

Second. Detroit United Railway shall do all paving on all lines except where existing franchises otherwise provide.

Third. Detroit United Railway will construct the proposed cross-town line on or near Junction Avenue, in connection with existing tracks; also connect the Mack avenue and Myrtle street line as heretofore proposed, and will extend the Kercheval avenue line easterly to St. Jean avenue; thence southerly to Jefferson avenue; and also make the necessary extensions to the new Michigan Central terminal station—all to be done on streets and locations to be approved by the common council. This work shall be started in 1913 and completed as soon as practicable, and all such lines and extensions shall

be constructed and operated under the same terms, in substance as the Hamilton boulevard extension, so-called, was constructed and is being operated.

Fourth. The Detroit United Railway will pay to the treasurer of the City of Detroit, on or before August 15, 1913, seventy-five thousand dollars (\$75,000) for the privileges exercised by it on the Fort street lines since July 24, 1910.

Fifth. While we have understood that payment of the \$300.00 per day under the resolution of the Common Council exempted the railway from the payment of the city taxes involved herein, nevertheless, for the purpose of reaching an adjustment of differences, the Detroit United Railway will pay to the treasurer of the City of Detroit the back city taxes assessed against it in the years 1910, 1911, 1912, as per the city treasurer's books, including interest and penalties as fixed by law, up to August 15, 1913—such payment to be made in 90 days, or sooner, from the 15th day of August, 1913, with interest at six per cent (6%) per annum from August 15, 1913, to the date of payment. This does not in any wise affect the liability of the Detroit United Railway for the taxes assessed against it for the year 1913.

Sixth. In consideration of the foregoing, the Detroit United Railway expects and understands that it shall be relieved of the payment of three hundred dollars (\$300.00) per day fixed by the resolution of the Common Council adopted on October 26, 1909, approved November 2, 1909.

Seventh. It is further understood that no existing rights of either the City of Detroit or the Detroit United Railway shall be impaired or affected in any wise by this temporary arrangement, except as herein explicitly stated, and that it is a day-to-day arrangement only.

Trusting that these terms will prove satisfactory to yourself and to the Honorable Common Council, I remain,

J. C. HUTCHINS,
President Detroit United Railway."

And, whereas the Mayor and Common Council have this day received the following supplementary communication from the Detroit United Railway:

"To the Honorable Mayor and Common Council of the City of Detroit:

"GENTLEMEN:

Referring to my communication to you submitted at the meeting of your Honorable Council on the evening of Tuesday, August 5th, 1913, I beg to say that in the hurry of preparation a slight error was made in the fifth subdivision of said letter, and I beg that you

amend the letter incorporating the following as paragraph five in place of five as written:

84 'While we have understood that the payment of the \$300.00 per day, under the resolution of the Common Council exempted the Railway from the payment of the City Taxes involved herein, nevertheless for the purpose of reaching an adjustment of differences, the Detroit United Railway will pay to the Treasurer of the City of Detroit the back City Taxes assessed against it in the years 1910, 1911, 1912, as per the City Treasurer's books, including interest and penalties as fixed by law. Such payment shall be made in 90 days or sooner after the 15th day of August, 1913, and shall include all interest and penalties as fixed by law up to the date of payment. This does not in any wise affect the liability of the Detroit United Railway for the taxes assessed against it for the year 1913.'

This error was made in favor of the Detroit United Railway and I have the honor to beg that the communication be amended as I have noted.

Very respectfully yours,

J. C. HUTCHINS,
President Detroit United Railway.

Aug. 7, 1913.

Now, therefore, be it resolved that the terms set forth in said letters be, and they are hereby accepted, and in consideration of the fulfillment of the terms of said letters, and while the Detroit United Railway is actually operating under the terms thereof and faithfully observing same, the Detroit United Railway shall not be required to pay the said three hundred dollars per day provided for in said resolution of the Common Council adopted October 26, 1909, and approved November 2, 1909, but it is hereby expressly relieved of such payments;

85 And, further, be it resolved that while this resolution shall be in force, the enforcement of the decree in the case of City of Detroit against Detroit United Railway, No. 37,446, in the Circuit Court for the County of Wayne in Chancery, known as the Fort Street rental case, shall be suspended and immediately after repeal of this resolution, the present existing status as to such decree shall be restored, and the city may at once enforce the terms of said decree, the same as if this resolution were not passed, and when this resolution takes effect, an order shall simultaneously be entered in said cause by consent of parties to the above effect.

And be it further resolved that this resolution may be repealed at any time by the Common Council.

EXHIBIT 4-B.

An Ordinance to Fix and Establish Maximum Rates of Fares and Charges which may be Exacted and Received by Persons, Corporations or Partnerships Operating Street Railways for the Carriage of Passengers within the City of Detroit, and to Fix a Penalty for the Violation Thereof.

It is Hereby Ordained by the People of the City of Detroit:

Section 1. No person, partnership or corporation operating a street railway on the streets of the City of Detroit for the carriage of passengers for hire, shall charge more than five cents for a single ride, or six tickets for 25 cents, per person for one continuous trip within the city over any line which is now operated or shall hereafter be operated without a franchise fixing the rate of fare.

86 Section 2. No such person, partnership or corporation shall charge a higher rate of fare upon any line now or hereafter operated under a franchise contract than is fixed by such franchise.

Section 3. Between the hours of five and six-thirty a. m. and four forty-five and five forty-five p. m. tickets in strips of eight for twenty-five cents shall be sold on all cars on all lines except where such sale would be contrary to the terms of a franchise contract, which tickets shall entitle the holder to the same rights between said hours as the payment of a five cent fare would.

Section 4. Where a trip is over two or more lines, whether franchise lines or not, the maximum fare shall be five cents, and no transfer fee shall be exacted which raises the total charge to more than five cents or six for 25 cents.

Section 5. A continuous trip means one journey from point to point within the city, whether the same is made upon one car or one line or by means of transferring from car to car or from line to line. Each such person, partnership or corporation, and the officers, agents, servants and employees thereof, shall, upon demand, furnish proper transfers to carry into effect the provisions of this section. The provisions of this Ordinance shall not be construed as an attempt to impair the obligation of any valid contract, but shall apply to and govern all such street railway passenger traffic in the city, except where the same is governed by the provisions of such contract.

Section 6. Any such person, partnership or corporation which shall violate the provisions of this Ordinance, or shall attempt to do so, and any officer, agent, servant or employee who shall
87 order or direct any such violation or attempted violation of the provisions of this Ordinance, shall be guilty of an offense, and upon conviction shall be fined not to exceed five hundred dollars, or imprisoned in the Detroit House of Correction for not to exceed ninety days, or shall be both fined and imprisoned in the discretion of the court, for each violation.

Section 7. This Ordinance is passed for the public welfare in the case of an emergency involving the peace, health and safety of the people of the city, and it is ordered to take immediate effect. It may be amended or repealed at any time by the Common Council of the City of Detroit. Unless so amended or repealed it shall remain in force for one year from August 9, 1918.

Extracts From Bill of Complaint Filed in the Circuit Court for the County of Wayne, in Chancery, by the City of Detroit Against The Detroit United Railway and Certain of its Officers, Being Chancery File No. 70,247.

Seventh. Plaintiff alleges that notwithstanding the obligation placed upon it by said franchises, the defendant did absolutely cease the operation of its cars on the 8th day of June, A. D. 1919, about 4:00 o'clock A. M. and by reason of its cessation of the operation of its cars it has paralyzed the industrial and commercial interests of the City of Detroit. Defendant discontinued the operation of its cars without cause or default on the part of the City of Detroit.

Eighth. Plaintiff further alleges that it is a city with a population of approximately one million inhabitants and is largely dependent for its transportation from the operation of the said Railway system of the Defendant, The Detroit United Railway, upon the streets, avenues and public places named in said mentioned ordinances or franchise.

The said system of street railway serves a large portion of the population of the City of Detroit and is extensively used by the citizens thereof in going to and from their places of employment in the industrial, business and manufacturing plants and establishments within the City of Detroit. That a large portion of the population of the City of Detroit live long distances from their places of employment and business and are mainly dependent upon the street car service provided by said street railway system, and that the discontinuance of the service has resulted in depriving such citizens hereinto mentioned and has entailed hardships and expense to them by reason thereof.

If said street railway system is not operated immediately by the said defendants, the residents of the City of Detroit using said line of Railway will continue to be deprived of the facilities provided for under the terms of the franchises and contracts hereintofore mentioned and made a part hereof.

90

EXHIBIT 4-D.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne, In Chancery.

No. 70247.

THE CITY OF DETROIT, Complainant,

vs.

DETROIT UNITED RAILWAY et al., Defendant.

At a Session of said Court Continued and Held in Circuit Court Room No. 7 of the Wayne Circuit Court Rooms, County Building, City of Detroit, Wayne County, Michigan, on Wednesday the 11th day of June, A. D., 1919.

Present, the Honorable Adolph F. Marschner, Circuit Judge.

The matters involved in the application of the plaintiff under its bill of complaint filed herein asking that the defendant company be required to operate its street railway system in the City of Detroit or for the appointment of a receiver, came on for hearing, all parties thereto being represented by their respective counsel. The Court, upon consideration of the interest of the parties to said case and the public, orders and decrees as follows:

91 1. That the defendant company forthwith take steps to put in operation and to commence the operation of its street railway system within the one fare zone within the City of Detroit and to carry passengers upon the cars operated upon said system within said one fare zone for a cash fare of five cents for each passenger, to include the right of any passenger to a transfer from one line to another anywhere within said one fare zone district.

2. It appearing that the matter in controversy between the City and the defendant Railway Company involves the question of the sufficiency of a five cent fare without a right of the company to charge an additional one cent for transfer, the Court for the purpose of having this matter equitably considered and determined adjudges and decrees that a board of arbitration be created by the parties to determine a reasonable and fair rate of fare for the carriage of passengers by the defendant Railway Company based upon the cost of the company of rendering the service required by the public through its street railway system, such board to take into consideration in determining such reasonable rate of fare such question and all such questions as will enable it to fix a reasonable rate of fare, such determination to be made as soon after the end of three months as possible. Such board of arbitration shall be created by each of the parties, the City of Detroit and Detroit United Railway, naming

one member of said board of arbitration within thirty days from the date hereof, the third member thereof to be selected by the two arbitrators so named, and in the event of such two arbitrators so named by the parties being unable or failing to agree within five days after their appointment upon the selection of such third member of such board of arbitration, then such third member of such board of arbitration shall be selected by the following four

92 Circuit Judges for the Circuit Court for the County of Wayne, in Chancery; Judges Hosmer, Mandell, Codd and Marschner.

3. The board of arbitrators so created shall determine whether there shall be an increase of the rate of five (5) cents herein tentatively fixed after a three months' trial taking into consideration all loss if any suffered by the Company during such period and making allowance therefor in any new rate established for said zone; provided, however, that such new rate shall in no event be greater than the equivalent of a five cent fare plus one cent for a transfer for a six months' period computed on the basis of the transfers actually used during the first three months of the year 1919. The rate of fare and the other provisions herein shall not extend beyond a period of six months from the date hereof unless otherwise mutually agreed between the parties, except as provided in paragraph six hereof.

4. This order in no manner affects or is intended to affect any of the fundamental rights or contractual rights of the parties in and to the streets of the City of Detroit as they exist at the present time, the intention being simply by the making of this order to provide for a rate of fare under which cars will be operated at the present and is to be considered only as a temporary solution of the problem before the Court.

5. The Court hereby retains jurisdiction of the subject matter to make such further and other order or decree as may be necessary or proper in the premises.

6. If the determination as to whether on the five cent fare the company suffers a loss, in that the income resulting therefrom for such period proves insufficient to pay the cost of providing the services required by the public, such loss shall be compensated

93 for as above herein provided down to the time that such determination shall be made, provided such rates shall continue long enough to meet the loss, if any, above specified but not to exceed nine months from date hereof.

7. The decision of a majority of the arbitrators shall be binding on the parties.

Circuit Judge.

EXHIBIT 4e.

By Councilman Nagel:

Whereas, a cessation of street car service occurred in the City of Detroit through a strike of the platform employees, so-called, of the

Detroit United Railway, on the morning of Sunday, the 8th day of June, A. D. 1919, by reason of the refusal of the Detroit United Railway to accept the terms of an offer of the City of Detroit as provided in a resolution of this Body passed on Friday, June 6, 1919, which cessation of street car service was detrimental to the economic interests of the City, and created a serious transportation crisis, and

Whereas, the City of Detroit, by reason thereof, instituted a suit in the Wayne County Circuit Court in Chancery to compel a resumption of street car service within the City or for the appointment of a receiver of the assets of the Detroit United Railway and a hearing of said application duly came on before the Honorable Adolph F. Marschner, Presiding Circuit Judge, on the afternoon of June 11th, 1919, at which hearing were present Mayor James Couzens, and other representatives of the City's legislative and legal departments, and

Whereas, as a result of said proceedings and the extended conference held thereon between the representatives of the City and the Detroit United Railway, an order and decree was on said date entered by the Court therein requiring the Detroit United Railway to immediately resume the operation of its street car lines within the City, and making other provisions relative to the subject matter involved, all of which appear in a copy of said order and decree this day transmitted to this body by the Mayor, and street car service having been resumed in the City of Detroit by the Detroit United Railway under said order:

Therefore be it Resolved, That the action of the Mayor and the Legal Department of the City of Detroit in connection therewith as a solution to the serious emergency situation confronting the City be and the same is hereby approved and that this body proceed with all responsible despatch (the importance of the matter being considered) to select an arbitrator for and in behalf of the City of Detroit as provided in said order and decree and to communicate the name of its arbitrator so selected to the Detroit United Railway when determined upon.

95

EXHIBIT 5.

To the Honorable the Common Council:

GENTLEMEN:

Relative to the railway ordinance, providing for an independent system, to be presented to your body tonight, I wish to draw your attention to the assurance of service-at-once, as well as genuine service-at-cost. The measure provides for the immediate construction of a unified, independent system, self-sustaining and laid out on permanent lines, yet capable of being linked up with remaining privately owned lines, in part or in whole, should conditions warrant such an undertaking. Every element of waste and duplication has been reduced to the minimum.

Likewise, I wish to call your attention to the fact that herein is contained a formula for smoothing out the long standing snarls in

Detroit's traffic system and affording the citizens their desired freedom from congestion at the heart of the city. The plan has been developed with the idea of raising the center of our traffic from its unnatural position near the southern boundary of our city to the Grand Boulevard, and affording the long-suffering industrial population an opportunity to travel on frequent north, south, east and west crosstown lines, rather than by the antiquated "around the city hall" service.

This new network of crosstown lines is an absolute necessity at once, for there are now more people in Detroit living outside the lines of the Boulevard than there were inside them ten years ago.

96 This is the point we have kept in mind in planning this new system. How long are we going to try to clear both the above and below the Boulevard traffic past the site of the old town pump on the Campus?

We have got to move up the hub of Detroit's proverbial traffic wheel. To do this we have provided five big East and West crosstown lines.

In laying out these lines they have been grouped in three classes, A, B, C. A and B systems should be completed within two years and, if an affirmative vote is received from the electorate, work will be begun on Class A the day after election.

This class should be ready for car operation within a year and Class B shortly afterward. The service-at-once plan proposes securing 156 miles of our own tracks in the city with the opportunity for establishing our own service without consultation with any private companies. It means the addition of 550 new cars, or half as many as the D. U. R. now operates during the rush hour.

One mile of new track is provided for each 2,000 of the 200,000 factory workers who now fight their way to and from the great east and west side factory districts.

It is my firm belief that the inauguration of this Independent System will do more to relieve Detroit's housing difficulties, and especially the congested rooming and apartment house situation in the district between the Boulevard and the river, than any army of builders and contractors we could ever hope to mobilize. In fact, nothing but an improved transportation system of this kind will entirely relieve our present housing situation.

As the building of Class C system will necessarily be delayed for some time, we have not included the cost of these lines in our
97 figures, but have included only the cost of constructing and equipping the lines proposed in Classes A and B.

The Class A system provides the taking over of 34.25 miles of lines built under the so-called "day-to-day" agreement, in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at say, an estimated cost of \$40,000 per mile.

This aggregates a total of \$2,220,000 for lines already built. The additional new lines proposed in Classes A and B system aggregate 100.75 miles, at an estimated cost of construction of \$70,000 per mile, which totals \$7,052,500.

In addition to this, assume we purchase 400 cars equipped with motors at an estimated cost of \$10,000 per car, which would aggregate \$4,000,000 and 150 trailers at an estimated cost of \$5,000 per trailer, aggregating \$750,000, or a total of \$4,750,000 for cars and trailers to which we have added \$1,000,000 for car barns, tools and miscellaneous equipment.

This totals in the aggregate \$15,022,500.

I have been watching the development of the gas street car, and recently I had a conference with Mr. Henry Ford, at which time he showed me several engines and plans for the car. In discussing the

98 details with his engineers, I was assured that the gas street car could be built for a maximum of \$5,000 per car, which would reduce the cost of car equipment 50 per cent, or in other words, cut the cost down to about \$2,000,000.

The adoption of this system of transportation will obviate the necessity of electrically equipping the lines, and of the building and equipping of power plants.

In proposing this \$15,000,000 public utility bond issue, we have been very liberal in our estimates of the probable cost of the completed street railway system which the plans cover.

In complying with the requirements of the charter, we have taken into consideration all of the items of expense with which the present company has to meet, and provided for interest charges on the \$15,000,000 at 4½ per cent, and to retire \$500,000 of the bonds per year, which would mean that all of the bonds would be retired in 30 years. It will be seen that as the principal is retired, the interest charges will be materially reduced. None of the interest charges or the fund for retiring the bonds will come out of the taxpayers, but will be taken out of fares collected from the car riders.

The plan which has been evolved, complies in every detail with the charter, commanding the officials to proceed with municipal ownership and operation. A study of the map will clearly indicate to you that the system is complete, without having any connection with the present company.

The several proposed crosstown lines will, in our opinion, greatly relieve the congested downtown district, and obviate the necessity of spending some \$8,500,000 for subway dips for some years.

99 I trust that your Honorable Body will give this ordinance your earnest consideration, so that, if adopted by you, there will be plenty of time for our citizens to inform themselves sufficiently on its details to be able to intelligently vote on the proposition at the special election provided to be called on April 5, 1920.

Respectfully submitted,

JAMES COUZENS,

Mayor.

Filed April 10, 1920. Elmer W. Voorheis, Clerk.

(Here follows document and map marked p. 100.)

101 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT, a Municipal Corporation, et al., Defendants.

Motion to Dismiss.

And now come the City of Detroit, a municipal corporation, and James Couzens, its Mayor, Henry Seffens, Jr., its Controller, Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, members of the Board of Street Railway Commissioners of said City of Detroit; and Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons and James Vernor, members of the Common Council of the City of Detroit, defendants in the above cause, and move the Court to dismiss the bill filed in this cause, for the following reasons:

(1) The facts contained in said bill of complaint are insufficient to constitute a valid cause of action in equity.

(2) No Federal question is presented in or by said bill of complaint.

(3) The bill of complaint herein does not involve the construction or application of any provision of the Constitution of the United States.

102 (4) The facts alleged in the bill do not constitute in law or in fact any threat by defendants, or any of them, of a confiscation of the property of the plaintiff or any part thereof; or of a deprivation of any of plaintiff's property without making just compensation therefor or of a taking of any of plaintiff's property without due process of law.

(5) The only averments of the said bill by which a federal question is sought to be presented are contained in the following enumerated paragraphs:

(a) Paragraph 13, page 27, in which the naked assertion is made:

"But the said Ordinance was by the said Mayor and -is subservient associates wickedly conceived and cunningly devised with the intention and for the purpose of trampling upon and setting at naught those ideas and dispensations of honesty, decency which it is now

and from the earliest ages has been the function of courts of justice to vindicate and of circumventing the high constitutional principles embodying those ideas and inceptions."

"It is the pernicious and mendacious purpose of the same Mayor, assisted by his said subservient associates and appointees at his behest and command to take the property of the plaintiff, that is the street railway tracks and overhead equipment now existing on the streets in said ordinance enumerated, for the use of the city and the people thereof, as such street railway tracks and equipment, without paying the plaintiff fair and reasonable compensation therefor."

(b) And later in said paragraph upon page 28 of said bill the following naked assertion:

"The claimed power of ordering said tracks and equipment to be removed from said streets is to be exercised only as a pretense, pretext and subterfuge for the accomplishing of the said iniquitous scheme of taking said property from the plaintiff for use as a street railway in its precise present condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor."

(c) In paragraph 13, page 29, thereof, in which the naked assertion is made:

"That a municipal or political subdivision of a state is by the high and beneficent provisions of the constitution adopted by the people of the United States, constrained to deal honestly and fairly with all persons, and not to take the property of any of them without due process of law, that is, paying fair and reasonable compensation therefor."

And later in said paragraph and upon said page the naked assertion:

"That it is the duty of the court, and that the court by right ought, and in justice must, strike directly at the vicious and unconscionable purpose clearly apparent in this scheme for the taking of the property of plaintiff without fair and reasonable compensation therefor."

(d) The naked assertion contained in paragraph 14, page 35:

"That it is an essential part of the real proposition of acquisition that the City will, by the threat that it will make plaintiff cease operating and remove its tracks from the street, and by other illegal means, compel plaintiff to sell said tracks to the City for an inadequate price, and to thereby deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th amendment of the constitution of the United States."

(e) The naked assertion contained in paragraph 16, pages 37 and 38, as follows:

"This in the circumstances stated in this bill is, plaintiff avers, a resort to illegal means to compel plaintiff to sell its property for an inadequate price, and to thereby deprive it of its property without due process of law in contravention of the due process of law clause of the 14th amendment of the Constitution of the United States.

Plaintiff further avers upon information and belief, that it is the intention of the said defendant, Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will conform to his will, to resort to other illegal means to compel plaintiff to assent to a sale of its said property for said inadequate value, and thereby deprive plaintiff of said property without due process of law, in contravention of the due process of law clause of the 14th amendment of the Constitution of the United States."

And later in said paragraph 16 as shown upon page 39 of the bill the naked assertion:

104 "It is the intention of said defendant Couzens, acting as Mayor of the City of Detroit and of the other defendants who are subservient to his will, and who will execute his will, to at once put in force said street railway proposition and upon the assumption, too, that this gives the City officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having adjudication as to the legality of the same and thereby deprive plaintiff of its property without due process of law in contravention of the due process clause of the 14th amendment of the Constitution of the United States."

That the said averments of the said bill in fact and in law present no federal question by which this court acquires any jurisdiction over the parties hereto or the subject matter herein involved and that the said averments are a mere subterfuge under color of which it is sought by the plaintiff to vest jurisdiction of the parties herein and the subject matter herein in this court.

(6) As to those streets upon which the bill alleges the City of Detroit threatens to order cessation of street railway service and removal of street railway tracks therefrom, the said City has the legal right to order such cessation and such removal; and the existence of such legal right negatives any claim that the execution of said right would invade the 14th amendment of the Constitution of the United States.

(7) Said bill does not state any matter of equity entitling plaintiff to the relief prayed for or of which this court may take judicial cognizance, nor are the facts as stated sufficient to entitle plaintiff to any relief against the defendants or any of them.

(8) That the ordinance and proposition voted upon on April 5, 1920, and referred to in said bill, invade no constitutional right or privilege of the plaintiff, and empowers no official of the said city either to violate any contractual right which the plaintiff may have

or to confiscate or impair any property or property right of the plaintiff.

105 Wherefore defendants pray the judgment of this Court whether they shall further answer and that they be dismissed with their costs.

CLARENCE E. WILCOX,
ALFRED LUCKING,
ALFRED J. MURPHY,
Attorneys for Defendants.

Filed April 30, 1920. Elmer W. Voorheis, Clerk, by Carrie Davison, Deputy Clerk.

106 In the District Court of the United States for the Eastern District of Michigan.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

THE CITY OF DETROIT, Defendant.

Before Hon. Arthur J. Tuttle, District Judge.

Thursday, May 27th, 1920—10 a. m.

Appearances:

Messrs. Elliott G. Stevenson, William L. Carpenter and Hinton E. Spalding on behalf of the plaintiff.

Messrs. Clarence E. Wilcox, Corporation Counsel, Alfred J. Murphy and Alfred Lucking on behalf of the defendant.

Oral Opinion.

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TUTTLE, J.:

As I view it, the most difficult question that has been submitted to the Court is the one as to whether or not a Federal constitutional question is involved in the so-called D. U. R. suit. In the light of the recent decisions I reach the conclusion that it is my duty to take jurisdiction of that case, but I do so on the theory that the federal question is raised in good faith and not because when such question is properly answered the Bill shows any invasion of constitutional rights.

The other important questions of law discussed apply to both cases. A decision of the remaining questions will dispose of both cases.

In disposing of the different questions which have been raised here, I will briefly state the reasons for my conclusions. It is my duty to decide all of these questions of law on the assumption that all allegations of facts properly pleaded in the Bills are true. What are the rights of the Railway Company in the streets where the franchises have expired, I discover nothing in the allegations of

the Bill which change- the situation today in those streets from what it was when the Supreme Court of the United States decided the so-called Fort Street case and I hold that the rights are now as defined in that case.

108 The method of granting franchise rights to a transportation company by a municipality is so clearly defined that I can not reach the conclusion that street car companies can acquire rights in any other way. When the franchises so granted expire, the contractual relations cease and the rights of the street car company in the streets are at an end.

The recent decision by the United States Supreme Court in the case of the D. U. R. v. Detroit which went up from this court, as I understand it, simply means that if the city assumes to regulate they must regulate justly. In the light of this case and the so-called Fort Street case, I reach the following conclusions:

The contractual rights between the parties were terminated with the expiration of the franchise. The company at the expiration of their franchises had a reasonable time in which to remove their property from the streets. They have a right to terminate their service and remove their property if they desire to do so. The City, on the other hand, has a right to require them to remove, giving them a reasonable time for the removal. If at the expiration of these contractual rights, the City attempts to regulate, they must regulate in a reasonable manner and they cannot fix confiscatory rates.

It seems to me that this is as far as that case intended to go. My earnest desire is to follow it and follow it accurately and
109 exactly the way that the courts have interpreted the law, and this is my conclusion as to what that case means. I do not think that case says or intended to say that in a case like this, where the city has permitted the street car company to operate without arrangement or by a day-to-day arrangement in which they have expressly provided that their rights were not to be changed, that new and additional rights continuing into the future have been created which would affect the situation here presented to the Court. I do not think that the situation so far as removal from street is concerned is any different five years following the termination of the ordinance than it is the next day after the ordinance is terminated. I do not think there is a change here. I am not basing this conclusion on the decree in the Fort Street case but I am basing it on the law as laid down by the Supreme Court of the United States in the opinion of the Fort Street case, and the recent decision by the Supreme Court in the D. U. R. case from this court. I hold that the situation has not changed and that the same reasoning that was controlling then is controlling today on Fort Street or any other street where franchises have terminated and no new franchises have been granted. This street car company and city and every other municipality and public service corporation would find themselves in a confusing plight if the law was otherwise. The situation here will frequently happen.

At the expiration of franchises they are frequently going
110 to be unable to agree on the terms of a new franchise, and
yet both parties are going to desire to have the cars continue
in operation for a time at least.

Now, if under those circumstances the courts are going to say
there is an implied agreement or an estoppel which changes the rights
of the parties more wrongs than equities will result. I find nothing
in the statutes or in the decisions of courts to indicate that under
such circumstances continuing rights are going to be acquired and
the determination of those rights is to be a judicial question. Suppose
I had heard the proofs in this case, had found all the facts to
be as alleged in the Bill of Complaint, and was now attempting to
define the rights of this public service corporation in the streets of
Detroit, and to say when those rights would be terminated, it
would be impossible to perform that task unless we say there are no
contractual relations in a case of this kind except they be made
according to law. I hold that the city has power to remove the
company from the streets in question.

Now, the question about the ordinance and the submission of it
to the people and the vote upon it: It is very plain and every one
is agreed that this ordinance gave no right to the city to buy any
property from the D. U. R. or to lease any property from the D. U.
R. or to condemn any property belonging to the D. U. R., and that
this city cannot do so without submitting a definite proposition to
the people of this city and receiving a three-fifths favorable vote
thereon. There is no question about that.

111 The charter of the City of Detroit has been adopted by a
proper vote of the people of this city, and it provides that
the city has the power to acquire municipally owned street car com-
panies, but it expressly says that it cannot acquire by purchase, lease
or condemnation, without submitting it to the people in the manner
which I have already mentioned. Not only by the limitations of the
charter, but by the limitations expressly mentioned in this ordinance,
we reach the conclusion that there are no rights at the present time
in the city to purchase, condemn or lease the property of the De-
troit United Railway, and that they can only obtain those rights by
submitting a definite contract, lease or scheme for condemnation to
the people and getting a three-fifths favorable vote upon it. There
is only one course for acquisition open at the present time for the
city under existing ordinances and that is to acquire by construction.

It is urged that the vote-s were deceived through oral written state-
ments of public officials of this city into a misunderstanding of this
ordinance. It was correctly published according to law. I hold that
those acts complained of were unofficial acts and that they have no
more bearing upon this legal proposition than they would if said
by some private citizen or one of the papers in this city.

112 I hold that this court cannot inquire into the things that
influenced the voters, and as far as I can go in that direction,
and the only inquiry I can make in that direction is to in-
quire whether or not the ballot on which this question was submitted
was a proper ballot. As to the things done in the campaign by

private individuals or public individuals, that is outside of the scope of proper investigation of this court.

The form of the ballot and whether the question was submitted by a proper ballot and in a proper manner to the voters is a judicial question. It is not necessary under the law that the entire ordinance be on the ballot, but that it be fairly described and identified with the ordinance which has been published, in such a way that the public may know what it is they are voting on, and I hold that this ballot does properly submit that question to the voters of this city and did so submit it.

The remaining question is raised by the claim that the ordinance in question was a part of a scheme to defraud the Detroit United Railway out of its property or to get its property at a confiscatory and unfair price. It seems to me that taking the plaintiff's bill at its fullest force in favor of the plaintiff, that the question must be decided adversely to the plaintiff, and in favor of the defendant.

I do not take it that the Bill charges that the three-fifths of the voters of Detroit who voted in favor of this ordinance (the judge of this court is not one of the number) are in a scheme to defraud

113 the Detroit United Railway out of its property, but the claim is that certain public officials have got a scheme of this kind. In addition to what I have already said about the inability of a court to inquire into the motives of electors and legislators in the casting of their votes, it seems to me a complete answer to the claim that it is a scheme to buy this property for less than it is worth and in a manner that violates the constitution; that this city under existing circumstances cannot buy this property. The only way they can do it is if this railway company enters into a contract to sell the property and then the contract is approved by a three-fifths vote of the people. The thing the court is asked to protect against cannot be done unless the Detroit United Railway itself and three-fifths of the vote of this city agree to it. That is something that the Mayor of this City cannot put across nor the Common Council of this City put across.

It seems to me that the injunction asked is far beyond anything that ever has been done by any court or ever ought to be done.

I believe that I have disposed of the principal questions involved and that they are controlling in both of these cases. A decree will be entered dismissing both Bills.

Mr. Stevenson: What bond will your Honor require on the appeal?

The Court: I think \$250. is sufficient. I will reserve a right, if I have the time to put what I have roughly said into the form of a memorandum opinion. To do that will not *de* depriving

114 any one of any of their rights.

Mr. Murphy: We consent to that, your Honor, and express it on the record.

Filed Aug. 3, 1920. Elmer W. Voorheis, Clerk, by Carrie Davison, Deputy Clerk.

115

Order Dismissing Bill.

At a Session of the District Court of the United States for the Eastern District of Michigan Continued and Held, Pursuant to Adjournment, at the District Court Room in the City of Detroit, in said District, on Thursday, the Twenty-seventh day of May, in the year of our Lord one thousand Nine Hundred and Twenty.

Present: The Honorable Arthur J. Tuttle, United States District Judge.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

In this cause defendants' motion to dismiss bill of complaint, coming on for hearing, on this day, is argued by counsel for respective parties, and the court being fully advised in the premises, does now here order, adjudge and decree that the bill of complaint herein be, and the same is hereby dismissed without costs.

116 In the District Court of the United States, Eastern District of Michigan, Southern Division, in Equity.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

Motion for Rehearing and Motion to Amend.

Now comes the said plaintiff, by Stevenson, Carpenter & Butzel, its attorneys and moves the court for a rehearing of the motion to dismiss the bill of complaint herein made by the defendants, for the reason that the court in holding in the decision of said motion that the action of the officials of the city of Detroit in preparing and distributing the document, of which a copy is attached to the bill of complaint as Exhibit 6, described in the 2nd paragraph of the 12th section of the bill of complaint herein, was not official action, misapprehended the facts regarding the preparation and distribution of said document, and erred in holding that said action did not affect the validity of the submission of the street railway proposition submitted to the electors of said city of Detroit at the election of April 5, 1920, or the validity of the election held thereon; and moves the court also for an order authorizing said plaintiff to amend its bill of complaint by inserting therein at the end of the 3rd paragraph of the 12th section thereof, and immediately after

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the words, "at addresses taken from the previous registration list" the following paragraph:

"That exhibit 7, hereto attached, is a true copy of the official proceedings of the representative officials of the City of Detroit, relating to the preparation and distribution of the document, a copy of which is attached to the bill of complaint as Exhibit 6, purporting to be a statement of the street railway plan to be voted on at the election of April 5, 1920, containing the proposition to be voted on at said election, together with certain explanatory matter as set forth in the second paragraph of section 12 of said bill of complaint."

and by appending to the said bill of complaint, as Exhibit 7, the extracts from the printed report of the proceedings of the common council of the city of Detroit contained in the affidavit of Hinton E. Spalding herewith filed.

This motion is based upon the records and files in this cause, upon the opinion of the court delivered at the conclusion of the argument of the said motion to dismiss directing a dismissal of the bill of complaint, and upon the affidavit of Hinton E. Spalding herewith filed.

STEVENSON, CARPENTER & BUTZEL,

Plaintiff's Attorneys.

118 In the District Court of the United States, Eastern District of Michigan, Southern Division, in Equity.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

EASTERN DISTRICT OF MICHIGAN,

County of Wayne, ss:

On this 29th day of May, A. D. 1920 before the undersigned, a Notary Public in and for said county, personally appeared Hinton E. Spalding who, being duly sworn, says:

That he is one of the counsel for plaintiff in the above entitled cause, and makes this affidavit on its behalf.

That on the 3rd day of February 1920 the Board of Street Railway Commissioners of the City of Detroit submitted to the Common Council of said city, which is the legislative body thereof, the following communication:

"To the Honorable the Common Council:

GENTLEMEN:

Since your Honorable Body passed the street railway development ordinance last Tuesday, many requests have been made upon us for copies of the ordinance and maps showing the routes that the new lines propose to take.

It has been thought best to get out practically a sample ballot with a map on the back thereof, showing the proposed routes.

The City Clerk obtained estimates of the cost of printing the ballots, addressing, mailing, etc., of some 300,000 ballots and, at that time, it was estimated it would cost \$10,500.00.

119 "In that considerable time has elapsed since the last registration, it is the opinion of this board that the mailing of the ballots would result in a considerable waste, because of the inaccuracies of the addresses and the changes that have taken place since the last registration. We, therefore, believe that some method other than that of mailing to the registered list would be more desirable.

"We request your Honorable Body to approve of the getting out of 300,000 such sample ballots and maps, and request authority to take the funds out of Item 501, Clerical Service and Expense, as there is left in that fund \$24,511.12.

"If this permission is granted, we will submit bids for the work to your Honorable Body for approval at a later date.

Respectfully submitted,

GRIFFITH OGDEN ELLIS,

W. B. MAYO,

Board of Street Railway Commissioners."

That thereupon, and upon the same date, the following resolution was adopted by said Common Council:

"By Councilman Nagel:

Resolved, That the Controller be and he is hereby authorized and directed to take from Item 501, 'Clerical Services and Expenses,' Street Railway Fund, the sum of \$10,500, and place same to the credit of the Board of Street Railway Commissioners, for the purpose of defraying cost of printing and distributing approximately 300,000 sample street railway proposition ballots with maps on back of same; and further

Resolved, That the Department of Purchases and Supplies be and is hereby authorized to advertise for bids for printing said sample ballots, and submit same to this body for approval.

Adopted as follows:

Yeas—Councilmen Bradley, Kronk, Littlefield, Nagel, Simons, Vernor and the President—7.

Nays—None."

all of which appears by the printed report of the proceedings of said Common Council for the Session of February 3, 1920, and on pages 135-136 of said printed proceedings.

That thereafter the Department of Purchases and Supplies of said City of Detroit, which by the Charter of said City is charged with the duty of advertising for bids for the furnishing of all
120 supplies, materials and equipment for the city, and for all departments, offices, boards and commissions thereof, where the amount of the proposed purchase is over five hundred

dollars, advertised for bids pursuant to the terms of said resolution, and thereafter, and on February 24, 1920, made the following report to the Common Council of the City of Detroit:

"To the Honorable the Common Council:

Gentlemen: In pursuance of your resolution of February 4, 1920, authorizing me to advertise for bids for the printing of the Street Railway Proposition, I caused notice to appear by advertising in the Detroit Legal News under date of February 6, and the following bids were submitted on February 13, 1920:

Federal Lithograph Company, Detroit, Michigan.....	\$4,275.00
Topping-Saunders Company, Detroit, Michigan.....	\$4,434.00
Stafford Printing Company, Detroit, Michigan.....	\$4,395.00
Gregory Mayer & Thom, Detroit, Michigan.....	\$5,050.00

The lowest bid was that of the Stafford Printing Company, taking into consideration the fact that their proposal contemplated the folding and clipping of each copy of 'Municipal Street Railway Proposition,' and the writer therefore recommends awarding of contract to said firm. This contract to include the printing of ordinance, a map of the proposed street car lines, with a brief statement of the estimated cost.

Printing to be in two (2) colors and in accordance with specification, etc., colors to be black and red, and it is to be made in accordance with proposal for the sum of \$4,395.00.

Respectfully yours,

JOSEPH A. MARTIN,

Commissioner."

That thereupon, and at a session held upon February 24, 1920 the said Common Council adopted the following resolution:

"Resolved, That the contract entered into by the Department of Purchases and Supplies with Stafford Printing Company for printing, folding and clipping copies of Municipal Street Railway Proposition, for the sum of \$4,395. be and the same is hereby approved and confirmed.

Adopted as follows:

Yeas—Councilmen Bielman, Bradley, Kronk, Littlefield, Nagel, Vernor and the President—7.

Nays—None."

121 all of which appears by the printed report of the proceedings of said Common Council of February 24, 1920, at page 237 of said proceedings.

(Sgd.)

HINTON E. SPALDING.

Subscribed and sworn to before me this 28th day of May, A. D. 1920.

(Sgd.)

CHARLES B. MARKS,

Notary Public, Wayne Co. Michigan.

My commission expires July 6, 1920.

Filed May 29, 1920. Elmer W. Voorheis, Clerk, by Carrie Division, Deputy-Clerk.

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Order Denying Motion to Amend, etc.

District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

At a Session of said Court Held at the Courtroom in the City of Detroit on the 8th Day of June, 1920.

Present: Hon. Arthur J. Tuttle, District Judge.

The motion heretofore made by the plaintiff for leave to amend its bill of complaint and for a rehearing of defendant's motion to dismiss said bill of complaint came on to be heard and after hearing counsel for the respective parties,

The court having offered to grant leave to amend said bill as proposed by the plaintiff conditionally, however, upon plaintiff's further amending its said bill as proposed by the defendants by appending thereto as exhibits copies of the resolutions of the Common Council of Detroit, described in general language in Section 5 of said bill, and the plaintiff having declined to accept said condition,

Ordered that said motion for leave to amend said bill and for a rehearing of said motion to dismiss be, and the same hereby is, denied.

ARTHUR J. TUTTLE,
District Judge.

Filed June 8th, 1920. Elmer W. Voorheis, Clerk.

Decree Dismissing Bill.

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

At a Session of said Court Continued and Held at the District Court Room of the United States for the Eastern District of Michigan, Southern Division, in the Federal Building in the City of Detroit, State of Michigan, within said District, on July 9, 1920.

Present: Honorable Arthur J. Tuttle, District Judge.

Defendants' motion to dismiss plaintiff's Bill of Complaint filed hereing having come on to be heard before said Court, and having been argued by Alfred J. Murphy on behalf of said defendants and by Elliott G. Stevenson on behalf of the plaintiff, the Court after due consideration thereof adjudges and decrees;

1. That giving to the Bill of Complaint its utmost probative value and according it entire good faith a question is presented involving the application of the fourteenth amendment to the constitution of the United States.

2. That the plaintiff railway company has no contract rights, privileges or franchises upon the following named streets, of the City of Detroit, to wit: On West Jefferson Avenue, from Artillery Avenue to Clark Street; on Clark Street from West Jefferson Avenue to Fort Street, West, on West Fort Street from Artillery Avenue to and across Woodward Avenue to Cadillac Square; on the southerly
124 part of Cadillac Square from Woodward Avenue to Randolph Street; on the northerly part of Cadillac Square from Woodward Avenue to Bates Street, on Bates Street from Cadillac Square to Randolph Street, on Randolph Street from Cadillac Square to Monroe Avenue; on Monroe Avenue from Randolph Street to Elmwood Avenue; on Elmwood Avenue from Monroe Avenue to Lafayette Avenue, East; on Lafayette Avenue East from Elmwood Avenue to Baldwin Avenue, on Helen Avenue from Jefferson Avenue East to Lafayette Avenue East; on Lafayette Avenue East from Elmwood Avenue to Randolph Street, said streets being traversed by the so-called Fort Street Lines, or under the bill of complaint herein on Woodward Avenue north from the Detroit River to the point of its intersection with Milwaukee Avenue, said street being traversed by the so-called Woodward Avenue lines. That whatever contract

rights, privileges and franchises said plaintiff company may have had in the above described streets have expired and the defendant City may require said company to cease its service upon such streets, other than on Woodward Avenue north of the Detroit River to the point of intersection with Milwaukee Avenue, and remove its property therefrom upon giving the notice and time for removal, as required under the terms of the decree entered in the case of City of Detroit vs. Detroit United Railway, pursuant to the opinion found in 172 Michigan, page 136. That the said company has acquired no rights in the said streets since the expiration of said franchises by reason of the facts alleged in plaintiff's bill of complaint as such rights can only be acquired by express grant from the defendant City according to the requirements of the statutes and constitution of Michigan.

3. That the proposition adopted and ratified by the electorate of the defendant City on April 5, 1920, does not empower said City to purchase, lease or condemn any specific property of the plaintiff company unless the specific contract to purchase or lease or plan to condemn be approved by three-fifths of the electors voting thereon, pursuant to the provisions of Section 8, Chapter 13, Title 4, of the Charter of the City of Detroit.

4. That the acts of the defendant Mayor, common council and board of street railway commissioners alleged in the bill to have deceived the voters into a misunderstanding of the ordinance of February 27, 1920, and the proposition thereunder submitted on April 5, 1920, have no legal bearing upon the validity of the election or the adoption of said proposition.

5. That the motives of electors in casting their votes at the municipal election of April 5, 1920, are not open to judicial investigation and injury.

6. That the ballot used at the municipal election of April 5th, 1920 was legally sufficient in form to describe and identify the proposition submitted and did properly submit the proposition embraced within the ordinance.

7. That neither the ordinance of February 27, 1920 nor the election of April 5, 1920 on said municipal railway proposition was a scheme on the part of any or all of the defendants to defraud the plaintiff of its property without due process of law; nor did said ordinance or said election constitute any breach, violation or invasion of any contract right of the plaintiff.

Now, therefore, in consideration thereof, it is

Ordered, adjudged and decreed that the plaintiff's Bill of Complaint be and the same is hereby dismissed for lack of equity with costs to the defendant to be taxed.

(Sgd.)

ARTHUR J. TUTTLE,
District Judge.

126

Claim of Appeal and Allowance.

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT, JAMES COUZENS, Mayor of the City of Detroit; Henry Steffens, Jr., Controller of the City of Detroit; Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners of the City of Detroit; Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John C. Nagel, David W. Simons and James W. Vernor, Members of the Common Council of the City of Detroit, Defendants.

Plaintiff in the above entitled cause, conceiving itself aggrieved by the final decree dismissing its Bill of Complaint entered on the 9th day of July, 1920, in the above entitled cause, for the reasons stated in its assignments of error presented herewith, does hereby appeal from said decree to the Supreme Court of the United States and it prays that this, its appeal, be allowed, and that the transcript of the record, together with the assignments of error and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 13th day of July, in the year of our Lord nineteen hundred and twenty.

STEVENSON, CARPENTER &
BUTZEL,

Attorneys for Plaintiff and Appellant.

DONNELLY, HALLY,
LYSTER & MUNRO, AND
H. E. SPAULDING,
Of Counsel.

127

And now, to-wit, on this 13th day of July, in the year of our Lord nineteen hundred and twenty, it is ordered that the appeal in the above entitled cause be allowed as prayed for.

(Sgd.)

ARTHUR J. TUTTLE,

District Judge.

Filed July 13th, 1920. Elmer W. Voorheis, Clerk, Lew W. Levinson, Deputy Clerk.

128 In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff & Appellant,

VS.

CITY OF DETROIT, JAMES COUZENS, Mayor of the City of Detroit; Henry Steffens, Jr., Controller of the City of Detroit; Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners of the City of Detroit; Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John C. Nagel, David W. Simons and James W. Vernor, Members of the Common Council of said City of Detroit, Defendants and Appellees.

Assignments of Error.

And now comes the above named plaintiff and appellant, Detroit United Railway, by Stevenson, Carpenter & Butzel, its attorneys, and files with its petition for appeal the following assignments of error. It says that the District Court in rendering the final decree in the above entitled cause erred in the following particulars:

1. In granting defendants' motion to dismiss plaintiff's Bill of Complaint and in entering a decree dismissing the same upon the ground that it presented no cause for equitable relief.

129 2. In holding, as stated in paragraph 2 of said Decree:

"That the plaintiff railway company has no contract rights, privileges or franchises upon the following named streets of the City of Detroit, to-wit: On West Jefferson Avenue, from Artillery Avenue to Clark Street; on Clark Street from West Jefferson Avenue to Fort Street, West, on West Fort Street from Artillery Avenue to and across Woodward Avenue to Cadillac Square; on the southerly part of Cadillac Square from Woodward Avenue to Randolph Street; on the northerly part of Cadillac Square from Woodward Avenue to Bates Street, on Bates Street from Cadillac Square to Randolph Street, on Randolph Street from Cadillac Square to Monroe Avenue; on Monroe Avenue from Randolph Street to Elmwood Avenue; on Elmwood Avenue from Monroe Avenue to Lafayette Avenue East; on Lafayette Avenue East from Elmwood Avenue to Baldwin Avenue, on Helen Avenue from Jefferson Avenue East to Lafayette Avenue East; on Lafayette Avenue East from Elmwood Avenue to Randolph Street, said streets being traversed by the so-called Fort Street Lines, or under the bill of complaint herein on Woodward Avenue north from the Detroit River to the point of its intersection with Milwaukee Avenue, said street being traversed by the so-called

Woodward Avenue lines. That whatever contract rights, privileges and franchises said plaintiff company may have had in the above described streets have expired, and the defendant City may require said company to cease its service upon such streets, other than on Woodward Avenue north of the Detroit River to the point of intersection with Milwaukee Avenue, and remove its property therefrom upon giving the notice and time for removal, as required under the terms of the decree entered in the case of City of Detroit vs. Detroit United Railway, pursuant to the opinion found in 172 Michigan, page 136. That the said company has acquired no rights in the said streets since the expiration of said franchises by reason of the facts alleged in plaintiff's bill of complaint as such rights can only be acquired by express grant from the defendant city according to the requirements of the statutes and constitution of Michigan.

3. In inserting in the Decree dismissing plaintiff's Bill of Complaint, the following provision whereby defendant city is given affirmative relief, namely:

130 "And the defendant City may require said Company to cease its service upon such streets, other than Woodward Avenue north of the Detroit River to the point of intersection with Milwaukee Avenue, and remove its property therefrom upon giving the notice and time for removal, as required under the terms of the decree entered in the case of City of Detroit vs. Detroit United Railway, pursuant to the opinion found in 172 Michigan, page 136."

4. In holding, as stated in paragraph 4 of said Decree:

"That the acts of the defendant Mayor, common council and board of street railway commissioners alleged in the bill to have deceived the voters into a misunderstanding of the ordinance of February 27th, 1920, and the proposition thereunder submitted on April 5, 1920, have no legal bearing upon the validity of the election or the adoption of said proposition."

5. In holding, as stated in paragraph 5 of said Decree:

"That the motives of electors in casting their votes at the municipal election of April 5, 1920, are not open to judicial investigation and inquiry."

6. In holding, as stated in paragraph 6 of said Decree:

"That the ballot used at the municipal election of April 5th, 1920, was legally sufficient in form to describe and identify the proposition submitted and did properly submit the proposition embraced within the ordinance."

7. In holding, as stated in paragraph 7, of said Decree:

"That neither the ordinance of February 27, 1920, nor the election of April 5, 1920, on said municipal railway proposition was a scheme on the part of any or all of the defendants to defraud the plaintiff of its property without due process of law, nor did said or-

dinance or said election, constitute any breach, violation or invasion of any contract right of the plaintiff.

131 8. In holding that the facts alleged in the Bill of Complaint did not show that any property right of the plaintiff had been or will be by reason of anything in said Bill set forth, taken or impaired without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States.

9. In holding that the proposition relative to the acquisition by the City of Detroit of a municipal street railway system was validly submitted to the electors of said city at the election held on April 5th, 1920, and that the vote thereon gave valid authority to construct street railway lines and maintain and operate municipal street railways upon the streets in said proposition described.

10. In holding that in determining the effect of the affirmative vote of the electors of the City of Detroit on the street railway proposition submitted to them at the election held April 5th, 1920, no consideration whatsoever should or will be given to the statements in the Mayor's message (Exhibit 5) attached to plaintiff's bill of complaint.

11. In holding that in determining the effect of the affirmative vote of the electors of the City of Detroit on the street railway proposition submitted to them at the election held April 5th, 1920, no consideration should or will be given to the fact that defendants, as averred in said Bill, prepared and distributed to said electors before election, the sample ballot, Exhibit 6, attached to plaintiff's Bill of Complaint, with the explanation thereon of said proposition to be submitted at said election.

12. In failing to consider the fact that the amount of 131½ bonds provided for in the proposition relative to the acquisition by the City of Detroit, of a municipal street railway system, submitted to the electors of said City at the election of April 5th, 1920, was much less than the amount necessary for the acquisition of the street railway lines provided for in said proposition, and that the statement in said proposition, would lead the voters to suppose that said amount was adequate to acquire said street railway lines; and in failing to hold that the submission of said proposition was therefore invalid.

13. In refusing to allow plaintiff to amend its Bill of Complaint as proposed by said motion to amend said Bill, except upon the condition that it would further amend its said Bill as proposed by the defendants, and in denying plaintiff's motion for a re-hearing of defendant's motion to dismiss after the plaintiff had declined to accept said condition.

Wherefore appellant prays that the decree of the District Court of the United States for the Eastern District of Michigan, Southern

Division in Equity, entered in the above entitled cause may be reversed.

STEVENSON, CARPENTER & BUTZEL,
Attorneys for Plaintiff & Appellant.

DONNELLY, HALLY, LYSTER & MUNRO,
H. E. SPALDING,
Of Counsel.

Filed July 13th, 1920. Elmer W. Voorheis, Clerk, By Lew W. Levinson, Deputy Clerk.

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Citation.

UNITED STATES OF AMERICA, *ss:*

To The City of Detroit, a Municipal Corporation; James Couzens, Mayor of the City of Detroit; Henry Steffens, Jr., Controller of the City of Detroit; Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners of the City of Detroit; Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons and James Vernor, Members of the Common Council of the City of Detroit, Greeting:

You are hereby cited and admonished to appear at a session of the Supreme Court of the United States at Washington, on the 24th day of August, next, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, wherein the Detroit United Railway, a Michigan Corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 13th day of July, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and Forty-four.

ARTHUR J. TUTTLE,
District Judge.

Service accepted July 14th, 1920.

CLARENCE E. WILCOX,
Corporation Counsel.

133

Bond on Appeal.

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT, JAMES COUZENS, Mayor of the City of Detroit; Henry Steffens, Jr., Controller of the City of Detroit; Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners of the City of Detroit; Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Krone, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons and James Vernor, Members of the Common Council of the City of Detroit, Defendants.

Know all men by these presents, that we, the Detroit United Railway, a corporation as principal, and William L. Carpenter and Elliott G. Stevenson, of Detroit, as sureties, are held and firmly bound unto the City of Detroit, a municipal corporation, James Couzens, Mayor of the City of Detroit, Henry Steffens, Jr., Controller of the City of Detroit, Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, members of the Board of Street Railway Commissioners of the City of Detroit, Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons and James Vernor, members of the Common Council of the City of Detroit, in the penal sum of Two hundred and fifty dollars (\$250.00), lawful

134 Money of the United States, to be paid to the said City of Detroit, a municipal corporation, James Couzens, Mayor of the City of Detroit, Henry Steffens, Jr., Controller of the City of Detroit, Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, members of the Board of Street Railway Commissioners of the City of Detroit, Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons and James Vernor, members of the Common Council of the City of Detroit, and for the payment of which we bind ourselves and each of us, and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 13 day of July, A. D. 1920.

Whereas, the above named Detroit United Railway, has prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled cause by the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division.

Now, therefore, the condition of this obligation is such that if the

above bounden, the Detroit United Railway, shall prosecute said appeal to effect and answer for all damages and costs that may be adjudged against it if it fails to make said appeal good and effective, then this obligation shall be void, otherwise to be and remain in full force and effect.

DETROIT UNITED RAILWAY,
By A. E. PETERS,
Secretary,
WILLIAM L. CARPENTER,
ELLIOTT G. STEVENSON.

And now, to wit, on this 13th day of July, A. D. 1920, it is ordered that the form and penalty of the foregoing bond and the
135. sufficiency of the sureties be and the same is hereby approved, and that all proceedings on the decree in said cause are hereby stayed.

ARTHUR J. TUTTLE,
District Judge.

Filed July 13th, 1920. Elmer W. Voorheis, Clerk, by Lew W. Levinson, Deputy Clerk.

136

Docket Entries.

United States District Court.

Docket No. 329.

Title of Case,

THE DETROIT UNITED RAILWAY, a Michigan Corporation, Plaintiff,
vs.

THE CITY OF DETROIT, a Municipal Corporation; JAMES COUZENS, the Mayor of said City; Henry Steffens, Jr., the Controller of said City; and Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners of said City of Detroit; and Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John C. Nagel, David W. Simons and James Vernor, Members of the Common Council of said City.

Attorneys.

Stevenson, Carpenter, Butzel & Backus; Donnelly, Hally, Lyster & Munro, and H. E. Spalding, of Counsel, Detroit, Michigan.
Clarence E. Wilcox, Corporation Counsel, Alfred Lucking and Alfred J. Murphy, Detroit, Michigan, for Defendants.

Filings—Proceedings.

Month.	Day.	Year.	
April	10,	1920.	Bill of Complaint filed.
"	"	"	Chancery Subpoena issued.
"	16	"	Chancery Subpoena returned served, filed and entered.
"	30	"	Motion to dismiss filed and entered.
"	"	"	Notice of hearing Motion to dismiss filed.
May	10	"	Order Granting leave to file Briefs on Motion to Dismiss on or before May 22/20 and fixing hearing for May 27, 1920.
"	27	"	Decree Dismissing Bill of Complaint entered.
"	29	"	Motion for re-hearing and for leave to amend filed and entered.
"	"	"	Order granting motion to amend conditionally, entered.
June	2	"	Proof of service of Motion for Re-hearing, etc. filed.
"	8	"	Order Denying Motion to Amend, etc., filed and entered.
July	2	"	Notice of Settlement of Decree for Friday, July 9, 1920, filed.
"	9	"	Decree Dismissing Bill of Complaint filed and entered.
"	13	"	Claim of Appeal and Allowance of Appeal filed, Order entered.
"	"	"	Assignment of Errors filed.
"	"	"	Bond on Appeal in \$250 William L. Carpenter & Elliott G. Stevenson, Sureties.
"	"	"	Citation issued, Returnable August 24, 1920.
July	15	1920.	Acceptance of service of citation filed.
Aug.	3	"	Præcipe for Record on Appeal filed.
"	"	"	Oral Opinion filed.

137

Præcipe for Record.

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of

the Supreme Court of the United States, by including therein the following:

1. Bill of Complaint.
2. Motion to Dismiss.
3. Motion for Re-hearing and Motion to Amend.
4. Order Denying Motion for Re-hearing and Motion to Amend.
5. Decree.
6. Claim of Appeal and allowance.
7. Assignments of Error.
8. Citation.
9. Bond on Appeal.
10. Copy of Journal Entries.
11. Opinion of Court.

Dated, this 3rd day of August, 1920.

STEVENSON, CARPENTER &
BUTZEL,

Attorneys for Appellant and Plaintiff in Error.

Filed August 3, 1920. Elmer W. Voorheis, Clerk, by Carrie Davison, Deputy-Clerk.

138 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

THE DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the claim of appeal of The Detroit United Railway, plaintiff in the above entitled cause; that it is a true copy of the records and proceedings as designated to be included in the return to claim of appeal to be made by the Clerk of the Court, as the same appear of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript of the whole and of every part of the record as designated.

In Testimony Whereof I have hereunto set my hand and affixed

the seal of said court, at Detroit, in said District, this 10th day of August, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and fortieth.

[Seal of the U. S. District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
*Clerk United States District Court,
Eastern District of Michigan.*

139 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT, a Municipal Corporation; JAMES COUZENS, Mayor of the City of Detroit; Henry Steffens, Jr., Controller; Ralph Wilkinson, William B. Mayo and Griffith O. Ellis, Members of the Board of Street Railway Commissioners; Charles F. Bielman, William E. Bradley, Fred W. Castator, John A. Kronk, Sherman Littlefield, John C. Lodge, John Nagel, David W. Simons, and James Vernor, Members of the Common Council of the City of Detroit, Defendants.

Whereas by an order of this Court under date of August 14th, 1920, an order was made providing that additional portions of the record be included in the return to the Supreme Court for the purpose of appeal, and whereas the Clerk of the Court prematurely returned the return on appeal under date of August 10th, 1920 which was prior to the time for the sending of the return,

It is hereby stipulated by and between the above named parties by and through their respective counsel that a supplemental return shall and may be made by the Clerk of the Court and filed with the Clerk of the Supreme Court of the United States in this matter as provided in said order of August 14th, 1920.

STEVENSON, CARPENTER & BUTZEL,
ELLIOTT G. STEVENSON.

Attorneys for Plaintiff in Error and Appellant.

CLARENCE E. WILCOX,

Attorney for Defendant in Error and Appellees.

Filed September 4th, 1920. Elmer W. Voorheis, Clerk.

140 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of Stipulation as to supplemental return on appeal, in the therein entitled cause as the same appears on file and of record in my office; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said district, this Fourth day of September, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and forty-fifth.

[Seal of the U. S. District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
Clerk.

[Endorsed:] No. 329. The District Court of the United States, Eastern District of Michigan—Southern Division. Detroit United Railway, Plaintiff, vs. City of Detroit et al., Defendants. Certified Copy of Stipulation as to supplemental return on appeal.

141 In the Supreme Court of the United States.

No. —.

THE DETROIT UNITED RAILWAY, Appellant,

vs.

CITY OF DETROIT et al., Appellees.

Supplemental Return of Clerk of Court on Appeal in Above Entitled Cause.

Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

142 *Defendants' Præcipe for Additional Matter to be Embodied in Return to Claim of Appeal.*

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT et al., Defendants.

The Clerk of this Court is hereby requested and directed to prepare and certify the attached transcript of the record and of Exhibit 101 in the above entitled case for the use of the Supreme Court of the United States, in addition to the items and matters specified in the præcipe of appellant and plaintiff in error heretofore filed on the 3rd day of August 1920.

CLARENCE E. WILCOX,
Corporation Counsel.

ALFRED LUCKING,
ALFRED J. MURPHY,

Attorneys for Appellees and Defendants in Error.

143 *Defendants' Motion to Embody Additional Matter in Return to Claim of Appeal, Plaintiff's Ex. 101, Attached.*

In the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT et al., Defendants.

Statement from Record under Equity Rule 75.

(a) At the argument of the motion to dismiss on May 27, 1920 before Honorable Arthur J. Tuttle, District Judge, the following occurred:

"The Court: We are about to take up the oral argument on the motions to dismiss in two equity cases pending in this court. I have not the numbers, but one is the Detroit United Railway vs. the City of Detroit, et al., and the other is the New York Trust Company, trustee, vs. The City of Detroit et al. We are taking up the oral argument after the filing of written briefs, and the court starts out with the hearing of this motion with the opinion and understanding and belief that the ordinance which has been adopted by a three-

fifths — of the people of the City of Detroit does not give to the city any power, authority or right to acquire a municipality owned street car system by purchase, lease or condemnation without submitting the particular condemnation and the particular purchase or the particular lease to the people and receiving a three-fifths favorable vote thereon. I have made inquiry of counsel and they have expressed themselves as entertaining the same view on both sides. That is all that occurred that I recall prior to the reporter's coming in to the room, and if counsel on either side have in mind something new that they would like to have appear in the record, let us have it in the record. Is there anything that occurs to you?

144 Mr. Stevenson: I think that your Honor has covered it.

Our view, however, is that the ordinance standing by itself, the action that is thus taken authorized only the acquiring of the proposed street railway system by construction, not in whole or in part the purchase of the said street railway system or lease or condemnation.

The Court: It is my understanding that there is not anything anywhere that gives the City of Detroit a right to acquire the D. U. R. or any part of their street car system in any way at the present time without submitting the question to the people and getting a three-fifths vote on it. Making it that broad, I might say that in the law there is not any way that the City of Detroit can get the D. U. R. property or any part of it without submitting that matter to the people and getting a three-fifths vote on it.

Mr. Murphy: We are agreed with your Honor upon that, but we should like to have it understood that in any further submission it would not be necessary to submit the question of further provision of funds. The funds are already provided under the pending submission.

The Court: That is where there perhaps may be some difference and I do not desire to get any of you into any concession that you do not fully intend to make. My only thought was to see that we were fully agreed to that one thing.

Mr. Stevenson: I think the gentleman's statement is that we will be at variance. I have made this memorandum from the remarks made by the Court:

'The case will proceed as it is the conclusion reached by the Court that the City has authority only to proceed to acquire the street railway system by construction. It can not use any part of the \$15,000,000 for purchase, lease or condemnation of the street

145 railway system.'

Mr. Murphy: From that we dissent absolutely.

The Court: I never said that on this record. That is something that you are going to argue about perhaps and I have no desire to get either of you into some concession here about the things in dispute, but simply that broad question that I thought you would all be of one mind about. As to this question: As to whether or not they have a valid bond issue or what they can do with that money, I understand you are in dispute about that, and I did not intend to

decide that or I had no hopes of getting a concession from you about it."

(b) Copy of the official ballot used in the election of April 5, 1920, marked Exhibit 101 was, by consent of the parties, considered a part of the record and is as follows:

(Here follows ballot marked page 146.)

147

PLAINTIFF'S EX. 101.

STATE OF MICHIGAN,
City of Detroit, ss:

I, Richard Lindsay, Clerk of the City of Detroit and Chairman of the City Election Commission of said City, do hereby certify that the annexed is a true copy of the Municipal Street Railway Ballot, so-called, and is identical with the ballots issued to the electors of the City of Detroit and voted on at an election held in said City on the 5th day of April, A. D. 1920.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said City at Detroit this 8th day of May, A. D. 1920.

[City of Detroit Corporate Seal.]

RICHARD LINDSAY,
City Clerk.

148 In the District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity. No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT et al., Defendants.

To Stevenson, Carpenter, Butzel & Backus, Attorneys for Appellant and Plaintiff in Error, Detroit, Michigan:

Please take notice that on the 12th day of August, 1920, the undersigned filed with the Clerk of this Court a præcipe for addition to the record to be transmitted to the Supreme Court of the United States on the appeal taken in the above case, copy of which præcipe and additional record is herewith served upon you.

Please take notice further that the undersigned will present said statement for approval before Honorable Arthur J. Tuttle, United States District Judge at his Court Room in the Federal Building, Detroit, Michigan, on Monday, August 23rd, 1920, at 9:30 A. M. (Central Standard time) or as soon thereafter as counsel may be heard. Dated this 12th day of August, 1920.

CLARENCE E. WILCOX,
Corporation Counsel.
ALFRED LUCKING,
ALFRED J. MURPHY,
*Attorneys for Appellees and
Defendants in Error.*

Service of above notice and copy of præcipe and additional record is hereby accepted this 12th day of August, 1920.

STEVENSON, CARPENTER, BUTZEL
& BACKUS,
Attorneys for Appellee and Plaintiff in Error.

Filed August 12, 1920. Elmer W. Voorheis, Clerk.

149 *Order Granting Motion to Embody Additional Matter in
Return to Claim of Appeal.*

In the District Court of the United States for the Eastern District of
Michigan, Southern Division.

In Equity. No. 329.

DETROIT UNITED RAILWAY, Plaintiff,

vs.

CITY OF DETROIT et al., Defendants.

At a Session of said Court Held this 14th Day of August, A. D.
1920.

Present: Honorable Arthur J. Tuttle, District Judge.

Defendants in error and appellees having filed a præcipe herein requesting certain additional portions of the record incorporated into the transcript as therein contained and notice of hearing on same having been served upon plaintiff in error and appellant for August 23rd, 1920, but both parties appearing in open Court on this date and consenting to an order thereon and waiving notice of hearing and it further appearing that plaintiff in error and appellant consents to the additions referring to the official ballot but objects to the addition containing the statements at the opening of arguments.

On due consideration thereof the Court does hereby approve said addition of portions of the Record as proposed by defendants in error and appellees and the Clerk is hereby authorized and directed to include same in his return to the supreme Court for the purposes of appeal.

ARTHUR J. TUTTLE,
District Judge.

Filed August 12, 1920. Elmer W. Voorheis, Clerk.

150 UNITED STATES OF AMERICA:

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

THE DETROIT UNITED RAILWAY, Plaintiff,

VS.

CITY OF DETROIT et al., Defendants.

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to the claim of appeal of the Detroit United Railway, plaintiff in the above entitled cause, this return being supplemental and in addition to my former return made herein; that this supplemental return is a true copy of the additional records and proceedings designated by defendants to be included in the return to claim of appeal herein, as the same appear of record and on file in my office; that I have compared the same with the originals of such supplemental matter so designated, and it is a true and correct transcript of the whole and of every part of the additional matter of record so designated.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said District, this 17th day of August, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States of America the one hundred and fortieth.

[Seal of the U. S. District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
*Clerk United States District Court,
Eastern District of Michigan.*

151 [Endorsed:] File No. 27849. Supreme Court U. S. October Term, 1920. Term No. 492. Detroit United Railway, App't., vs. City of Detroit, et al. Stipulation and addition to record. Filed Sept. 8, 1920.

Endorsed on cover: File No. 27849. E. Michigan D. C. U. S. Term No. 492. Detroit United Railway, appellant, vs. City of Detroit et al. Filed August 18th, 1920. File No. 27849.

**IN THE SUPREME COURT OF THE
UNITED STATES**

DETROIT UNITED RAILWAY, a corporation, vs. CITY OF DETROIT, a Michigan corporation,	Plaintiff in Error, Defendant.
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October Term 1920.

No. 492.

**MOTION TO ADVANCE OR FOR INJUNCTION
PENDING HEARING**

Now comes the Plaintiff in Error in the above entitled cause, by Elliott G. Stevenson, its attorney, and moves the Court that an order be entered herein advancing said cause for hearing on the docket of said Court for the October Term, 1920, at an early day, for the following reasons:

1. The plaintiff will suffer irreparable injury and damage if said case may not be heard and disposed of at an early date.
2. The defendant has already sold upwards of a million and a half dollars, face value, of the bonds for the issue of which plaintiff alleges there is no valid authority, and

has entered into contracts involving an expenditure of the proceeds of such bonds, and is preparing to enter into other large contracts involving in the aggregate large amounts to be paid out of the proceeds of such bonds, all of which, in the hands of bona fide purchasers, would probably be held to be valid obligations of the defendant municipality, notwithstanding the alleged invalidity of the proceedings purported to authorize their issue.

3. The action of the Court below in disposing of said cause was special and peculiar.

In case the foregoing Motion shall not be granted, said appellant moves the Court to grant its Writ of Injunction to restrain the defendant from issuing or disposing of further bonds under the proceedings set out in plaintiff's Bill of Complaint, as prayed for in said Bill of Complaint, pending the hearing and determination of this cause in this Court, for the following reasons:

(a) The defendant municipal corporation has issued under the authority alleged by plaintiff in error to be invalid, bonds exceeding in amount One million five hundred thousand dollars (\$1,500,000).

(b) The defendant municipal corporation intends to issue further large amounts of such bonds and to use the proceeds thereof in carrying out the plans for the construction of a municipal street railway system within the City of Detroit.

(c) The defendant municipal corporation has entered into contracts involving obligations exceeding One million

five hundred thousand dollars (\$1,500,000) and intends to proceed to let other contracts involving larger sums of money and to issue further bonds out of the proceeds of the sale of which they purpose paying the obligations incurred under such contracts.

(d) Because the defendant municipal corporation has incorporated recitals in such bonds that will probably make the same valid obligations of the City in the hands of bona fide purchasers.

(e) Because the proceedings under which the said bonds are issued are invalid and afford no legal warrant or authority for the issue thereof.

This Motion is based upon the Bill of Complaint filed herein and the affidavit of A. D. B. Vanzandt, Publicity Agent of Plaintiff in Error, a copy of which is hereto attached and marked Exhibit "A."

Elliott G. Stevenson,
Attorney for Plaintiff in Error.

John C. Donnelly,
William L. Carpenter,
P. J. M. Hally,
H. E. Spalding,
Of Counsel.

BRIEF STATEMENT OF MATTER INVOLVED

Plaintiff filed its Bill of Complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, to have an ordinance adopted by the Common Council of the City of Detroit, under date January 27, 1920, declared void and to prevent its enforcement, and to that end prayed for a temporary injunction restraining the issue of bonds purporting to be authorized under the terms of such ordinance and the vote of the electors had thereon on April 5, 1920. The Bill of Complaint was filed April 10, 1920.

After the filing of the Bill of Complaint with the Clerk of the United States District Court for the Eastern District of Michigan, Southern Division, and the service of process upon the defendant named therein, defendant, by its counsel, filed in said Court a motion to dismiss said Bill of Complaint for reasons assigned in such motion, and said motion came on to be heard before Honorable Arthur J. Tuttle, Judge of the District Court for the Eastern District of Michigan, on the ninth day of July, 1920.

Upon the argument of said motion to dismiss on said date, the said District Judge forthwith granted said motion to dismiss, and a decree of dismissal was, accordingly, entered, from which an appeal was taken to this Court.

The plaintiff alleges in its Bill of Complaint that it is the owner of the entire street railway system operated in the City of Detroit, affording transportation facilities for the people of the City of Detroit and for interurban traffic over interurban lines to and from the business center of the City of Detroit with many of the principal cities and towns in Eastern and Southern Michigan and with the cities of Toledo and Cleveland in the State of Ohio, and that the plaintiff is a taxpayer of the City of Detroit and has property therein assessed for and subject to taxation of the assessed value of upwards of \$25,000,000.

That the City of Detroit, through its Mayor and Common Council, proposed, by ordinance for submission to the people, a scheme or plan to construct a municipal street railway system within the City of Detroit and through two other municipalities—Highland Park and Hamtramck—lying within the boundaries of the City of Detroit. This plan involved taking over by the City certain lines of street railway owned and operated by the plaintiff Company, which would constitute the trackage and transportation facilities without which the proposed municipal system would be of no practical value. These lines for the most part consisted of Woodward Avenue, from Milwaukee Avenue South to the Detroit River, the so-called Fort Street Line, from Artillery Avenue on the West, to Jefferson Avenue at its intersection with Helen Avenue on the East, embracing thirty-three miles of street railway tracks and about thirty miles of trackage constructed by the plaintiff Company under what is ordinarily referred to as the "Day to Day Agreements." The proposition referred to was submitted to a vote of the electors held on April 5, 1920, and was approved by the necessary vote of such electors.

The attack made by the plaintiff on these proceedings was based upon three grounds:

First: That while the proposition submitted to the electors for their consideration was officially represented to be a proposition to take over that portion of the lines owned by the plaintiff Company referred to, *by purchase*, the ordinance did not authorize the City to take the same over by purchase, but involved simply a proposition to *construct* a new system of street railway, and this necessarily involved the tearing up and destruction of the tracks of the plaintiff company upon the lines referred to; and that while the ordinance provided only for such construction, the purpose and intent of the Mayor and Common Council of the City of Detroit, in proposing the submission of such question to the people, was not to exercise such power to construct, but only to use the same as a measure of coercion to compel the plaintiff Company to sell its property on the streets referred to at a wholly inadequate price, and they thereby undertook to take the plaintiff's property without due process of law in violation of the due process provision of the Fourteenth Amendment to the Federal Constitution.

Second: That the ordinance adopted by the Common Council under which only the City could act, provided for the *construction* of new tracks and equipment on and over the streets referred to then lawfully occupied by the plaintiff Company for street railway purposes; nevertheless, the Mayor and Common Council and other officers of the City of Detroit, in order to obtain the approval of such plan by the electors of the City, officially represented to such electors that the plan was not to force the removal or destruction of plaintiff's tracks and thereby deprive the public for a long period of the facilities provided by the same, but that such plan was to take over by purchase such lines

so that such transportation facilities imperatively required for the service of the people would not be disturbed, and that such misrepresentation, involving a matter vital to the electors in voting on such proposition and, as alleged in plaintiff's Bill of Complaint, influenced the vote of seventy-five per cent. of those voting for the proposition, invalidated the vote by which it was approved by the people and rendered the same entirely nugatory.

Third: That the Mayor and Common Council of the City officially represented to the electors, to influence their action in voting upon such proposition, that the \$15,000,000 of bonds proposed to be issued under the provisions of such ordinance would defray the cost in full of the complete construction and installation of such new municipal street railway system, well knowing that the amount of such bonds was wholly inadequate to provide for the same, and that it could not build such complete system—for the reason that it had no right to construct an important part of the same through other municipalities—Hamtramck and Highland Park—as it had not and could not secure right to construct a street railway system through the same.

The motion of defendant's counsel to dismiss alleged that the court below was without jurisdiction on the ground that no federal question was presented by the allegations of plaintiff's Bill of Complaint, and further, that the allegations of such Bill constituted no ground for equitable relief.

**WITH REFERENCE TO THE QUESTION OF
JURISDICTION:**

Inasmuch as the learned District Judge, in disposing of the motion made by the defendant to dismiss plaintiff's Bill of Complaint, held that the plaintiff's Bill of Complaint presented Federal questions conferring jurisdiction, we do not deem it necessary upon this motion to discuss this matter at any considerable length. We submit that the finding of the District Court upon this question is sufficient to warrant counsel in assuming that this Court will treat such finding as sufficient upon which to base the motion we have made.

At the outset of his opinion (R. p. 57), the District Judge said:

"As I view it, the most difficult question that has been submitted to the Court is the one as to whether or not a Federal constitutional question is involved in the so-called Detroit United Railway suit. (There were two suits under consideration, in one of which the Detroit United Railway is plaintiff, and in the other, the New York Trust Company is plaintiff). In the light of the recent decisions, I reach the conclusion that it is my duty to take jurisdiction of that case and I do so upon the theory that the Federal question is raised in good faith and not because when such question is properly answered, the bill shows any invasion of constitutional rights."

But we will very briefly discuss this question of jurisdiction.

The Court will readily recognize the rule laid down in *City Railway Co. v. Citizens Railway Co.*, 166 U. S. 563,

wherein Mr. Justice Brown, speaking for the Court, said:

"All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, *or claimed in good faith to have*, a contract with the city, which the latter had attempted to impair.
 . . .

(P. 564) "Whether the State had or had not impaired the obligation of this contract was not a question which could properly be passed upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect and such claim was apparently made in good faith and was not a frivolous one."

Plaintiff's bill of complaint alleged that it had actual rights in the streets, acquired by the approval and action of the defendant municipality, *after* the expiration by limitation of the franchises that had theretofore been granted plaintiff company, or its assignors, and after the decisions of the Michigan Supreme Court, 172 Mich., p. 136, and of this Court, 229 U. S., p. 39.

It further alleged that the Mayor and Common Council, the executive and legislative departments of the municipal government, had decided upon a policy of forcing the plaintiff, without having its rights passed upon judicially, to submit to having its property destroyed by removal, and this not for the purpose of in good faith attempting to have restored to it control of the streets, but for the unlawful purpose of coercing the plaintiff into disposing of its property to the City at an inadequate and unfair price.

It is a universally recognized rule of law that it is unlawful for persons to combine to take or obtain property of another, either by the exercise of unlawful means or the

exercise of lawful means in an unlawful way. So that even if it were conceded that plaintiff had no rights in the streets referred to and that the defendant had a lawful right to resume control of the streets, it could not exercise such lawful right by the unlawful means adopted of making a pretence of exercising such rights for the sole purpose of coercing the plaintiff to sell its property at an inadequate price.

The plaintiff company was in lawful occupancy of the streets referred to so far as the use thereof for operating a street railway system was concerned, even if it were only a tenant by sufferance. The City possessed the power but not the right, through its police and public works departments, to tear up plaintiff's tracks and destroy its property and it sought the legislation referred to by enacting the ordinance complained of, to place itself in a position to exercise its power without having the rights of the plaintiff Company judicially determined, and for the sole purpose of enabling it to coerce the plaintiff to sell its property at an inadequate and unfair price.

The specific allegation relating to this matter is found in the concluding portion of paragraph (16) of plaintiff's bill of complaint as follows:

"It is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same, and there-

by deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the United States."

Such means, we submit, constitutes an attempt to take plaintiff's property without due process of law and is an attempt to impair its contract rights even though such rights were only established by an implied contract resulting from acquiescence, approval and direction of the defendant municipal corporation with reference to the reconstruction of its entire tracks and overhead equipment, etc., on Fort Street after the expiration of its franchise grant by limitation and after the court decisions referred to.

See Cincinnati v. Traction Co., 245 U. S. 446.

The allegations of plaintiff's Bill of Complaint with reference to the question of jurisdiction as to the phase of the matter just discussed, are similar to the allegations contained in plaintiff's bill of complaint in the case of

Cuyahoga Power Co. v. Akron,
240 U. S., 462.

In the latter case it was averred that the city had no constitutional power to take the plaintiff's property for a water supply, and averred that the city did not intend to institute proceedings against the plaintiff, but intended to take its property and rights without compensation, and that the purpose of the city ordinance and certain statutes referred to is to appropriate the plaintiff's rights without compensation. Mr. Justice Holmes, speaking for the Court in deciding that case, said:

"Whether the plaintiff had any rights that the city was bound to respect can be decided only by taking jurisdiction of the case."

Plaintiff's bill further alleges that by the conduct and action of the defendant municipality, plaintiff company had acquired new rights after the decisions of the Supreme Court of Michigan and the Supreme Court of the United States in the Fort Street case referred to. These new rights were based in part upon the fact that after the city under the decree of the Supreme Court of Michigan, affirmed by the Supreme Court of the United States, had the right to oust the railway company from the use of Fort street, instead of exercising this right it, in recognition of the imperative need of the public of the City of Detroit to have the use of the plaintiff's transportation facilities on that street, authorized the plaintiff Company to entirely reconstruct its tracks and overhead equipment thereon, involving an expenditure of \$1,400,000, and also, after the affirmance of the decree of the Michigan Supreme Court referred to, authorized the plaintiff Company to partially reconstruct and better the tracks and facilities for serving the public of Detroit on Woodward Avenue, which involved an expenditure upon the part of the plaintiff Company of \$800,000, and that a substantial part of such expenditures were directed by express resolutions of the Common Council.

The approval and authorization by the City to the street railway company to reconstruct the tracks and make the expenditures referred to were had under the provisions of the charter of Detroit which required that before any work should be undertaken by the street railway company, or any other corporation or persons, in the streets of the city, it or they should obtain a permit from the Public Works Department of the city and upon the granting of such permit, the department referred to was required to appoint an inspector, representing the city, to see that the requirements of the city relating to the improvements to be made were complied with and the railway company

was required to pay the City the expense attending such inspector.

In pursuance of this provision of the charter of Detroit, plaintiff Company applied to the City, through its Public Works Department, for permission to reconstruct its track on Fort Street; likewise to make the betterments and improvements on Woodward Avenue. The permits were granted, the inspectors appointed, and the work under the supervision of the city representative was carried on to completion, and large sums of money were paid by the plaintiff Company to the City for the services of the inspector in making such supervision.

In addition to this, in 1918, the Common Council adopted an ordinance, approved by its Mayor, regulating and controlling the operation of plaintiff Company's entire street railway system within the City of Detroit. This ordinance was under consideration by this court in the case of *Detroit United Railway against City of Detroit*, 248 U. S., 429, in which case this Court held that the adoption of this ordinance in and of itself operated as a grant of new rights during its term.

Again, in 1919, owing to a strike of the employees of the railway company, growing out of a demand for increased compensation and the claim of the railway company as to the necessity for increased rates of fare to meet the demand made, the city filed a bill of complaint in the Circuit Court for the County of Wayne, in Chancery, praying for a mandatory injunction requiring the plaintiff to resume the operation of its street railway system, or for the appointment of a receiver for such company that it might be operated through receivership. And this was based upon the allegation contained in plaintiff's bill of complaint to the effect "that by reason of the plaintiff company's cessation of the operation of its cars, it paralyzed

the industrial and commercial interests of the City of Detroit.

In the particulars referred to and in other innumerable ways, the city authorities, including its Mayor and Common Council, have recognized from time to time the imperative need of the public of Detroit of the continued service of the plaintiff Company's transportation facilities.

It is not necessary to argue on this preliminary motion the legal effect of the conduct of the city in the particulars referred to. It is sufficient for us to say that under the conditions stated, plaintiff Company had acquired new rights of a determinate or indeterminate character after the decision of the so-called Fort Street cases, and that the City was bound to respect these new rights and not to undertake to destroy them, as was proposed by the adoption of the ordinance referred to, without judicial determination of the rights of the parties in connection with the same.

A question practically identical to this was discussed and decided by the Supreme Court of Michigan, in

Ramsdell v. Maxwell, 32 Mich., 282.

The opinion was written by the late Justice Campbell, concurred in by the late Justices Cooley and Graves of that court. The case grew out of mortgage foreclosure sale which had reached the stage where decree of foreclosure was granted and sale under the decree made and confirmed. After this had taken place, by a new agreement between the parties, the mortgagor, still in possession, was granted the right to continue therein upon condition of the carrying out of the terms of the agreement they had entered into. It was subsequently claimed that the mortgagor, thus in possession, had failed to carry out the terms of the new agreement and an application was made to the court and a writ of assistance was granted to

oust the mortgagor and deliver possession of the mortgaged property to the purchaser at the sale. The Court said: (p. 287)

"A writ of assistance is the regular process for carrying out a decree of possession, and lies on foreclosure sales. Its object is to compel parties who are bound up by a decree to give up the possession which by the decree and sale under it they have become estopped from further asserting, and when they have thus become tenants at sufferance. But it cannot be used to enforce any but such rights.

"Where a tenant at sufferance is allowed to continue in possession under a new arrangement, he ceases to be a tenant at sufferance and becomes a tenant at will, and must be so dealt with.

"But we do not see how a writ of assistance can be proper where there is any real controversy as to the right of possession not precluded by the decree and sale. No one can be compelled to try a contract on affidavits, and it would be a violation of elementary principles to attempt it. If Ramsdell claims to be entitled to possession, the defendant is entitled nevertheless to dispute that claim and have it determined in some legal or equitable proceeding where there can be a hearing. *And as the contest arises under an agreement made subsequent to the decree, of course no rights under the new agreement were settled by the decree.*"

If the Court has acquired jurisdiction in the case, based upon the ground that the defendant's action and conduct was a violation of the plaintiff's rights protected by the provisions of the Federal Constitution, the court will consider not only the federal questions involved, but the local questions, namely, whether the legislation or proceedings taken by the municipality were valid or in-

valid and contravened the rights of the plaintiff Company as a tax payer.

This was so ruled by this Court in a number of cases, including,

Siler v. Railroad Company, 213 U. S 175

The bill in that case attacked the validity of a Kentucky statute creating a state railroad commission, as a violation of various provisions of the federal constitution, and also averred that an order of the commission making general schedule and maximum rates for certain railroads was invalid because unauthorized by the statute.

The Court said: (p. 191)

"The federal questions as the invalidity of the state statute because, as alleged, it was in violation of the federal constitution, gave the Circuit Court jurisdiction, and having properly obtained it that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

"This court has the same right, and can, if it deem it proper, decide the local questions only and omit to decide the federal questions, or decide them adversely to the party claiming their benefit. . . .

. . . . Of course the federal question must not be merely colorable, or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."

The Court held the statute good but the order of the commission bad.

See also, *Ex Parte Young*, 209 U. S., 123
Home Telephone Co., v. Los Angeles
 227 U. S., 278;
Louisville Railway Co. v. Garrett,
 231 U. S., 298;
Cuyahoga Power Co. v. Akron,
 240 U. S., 462;
Green v. Railroad Co.,
 244 U. S., 499.
Cincinnati v. Traction Co.,
 245, U. S., 446.
Columbus Railway Co. v. Columbus,
 249 U. S., 299.

Counsel for the city in this case relied principally upon the cases of *Barney v. City of New York*, 193 U. S., 430, *Memphis v. Telephone Co.*, 218 U. S., 624.

This Court, in commenting upon the *Barney* case in *Home Telephone Co. v. Louisville*, 227, U. S., 294, said:

"As to the *Barney* case, it might suffice to say, as we have already pointed out, it was considered in the *Raymond* case and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex Parte Young*, it is now so distinguished or qualified as not to be here authoritative or even persuasive."

We submit that the District Judge was fully warranted in holding that the allegations of the plaintiff's bill of complaint made a case conferring jurisdiction in that it presented federal questions to be determined by that court.

**WITH REFERENCE TO THE FIRST GROUND OF
ATTACK STATED ABOVE (P. 6)**

The Bill of Complaint alleged that it was proposed to construct lines of street railway on the portions of Woodward Avenue and Fort Street and the "Day-to-Day Agreement" lines above indicated. The taking of such lines would leave without any adequate connections that portion of the plaintiff Company's Woodward Avenue line north of Milwaukee Avenue, about thirteen miles in length, and that portion of the Fort Street line lying West of Artillery Avenue, about twelve miles, and a portion of the "Day-to-Day Agreement" lines, about twenty-six miles. That plaintiff's entire street car system within the City of Detroit embraced, approximated two hundred and ninety miles of trackage. That the business center of Detroit lies within a one mile circle, of which circle the center is the City Hall, situated at the corner of Fort Street and Woodward Avenue, and from this center the main thoroughfares of said City radiate, and a large part of the street railway traffic of the city, including interurban traffic, is necessarily through and to and from such center and that the only means of access to such business center in connection with such proposed municipal system would be provided over the tracks on Woodward Avenue and Fort Street proposed to be taken under said proposition.

It was further alleged in plaintiff's bill of complaint that while the representatives of the City in connection with said proposition claimed that the plaintiff Company's rights over said Fort Street East of Artillery Avenue and said Woodward Avenue South of Milwaukee Avenue had expired by limitation and that it was not operating under

any existing franchise or grant, and that the City had a right under the so-called "Day-to-Day Agreements" to take over by purchase such "Day-to-Day Agreement" lines, the said ordinance was not framed or proposed for the purpose of purchasing the plaintiff's lines on such streets—but was limited to *constructing* lines of street railway upon the same, and necessarily involved the removal and destruction of plaintiff's tracks, foundations, overhead equipment, etc., with the incidental interruption of all traffic during the period of such removal and the construction of new lines. . . . (Rec. p. 15). That said ordinance was by the Mayor and his active associates wickedly conceived and cunningly devised with the view and for the purpose of setting at naught the rights of the plaintiff Company and it was the purpose of the Mayor of the City, assisted by his subservient associates and appointees, to take the property of the plaintiff, namely, the street car tracks and equipment now existing on the streets in said ordinance enumerated, for the use of the City of Detroit without paying the plaintiff fair and reasonable compensation therefor. That the method of accomplishing such dishonest and unlawful purpose as was openly and publicly and officially stated by the Mayor, and his associates, was to offer the plaintiff Company the sum of \$40,000 per mile for each mile of track (including overhead equipment) so to be taken over, which sum as was well known to the Mayor and associates, is less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associates will order said tracks removed from said streets; and that it was not proposed or intended by the Mayor to exercise the claimed power of ordering said tracks and equipment from said streets, because said railways are no longer required thereon for the public convenience, or any other reason or purpose, but the

claimed power is to be exercised only as a pretence for the accomplishment of said scheme of taking said property from the plaintiff for use as a street railway in its existing condition without paying fair and reasonable compensation therefor.

All of which was in violation of the provisions of the Fourteenth Amendment to the Federal Constitution.

WITH REFERENCE TO THE SECOND GROUND OF ATTACK STATED ABOVE (P. 6)

Plaintiff's Bill of Complaint shows that the ordinance adopted by the Common Council, January 27, 1920, and subsequently submitted to a vote of the people on April 5, 1920, was submitted to it with a written official communication from the Mayor under date of January 6, 1920, the same being Exhibit 5 of plaintiff's Bill of Complaint.

The statement relating to the Fort Street and Woodward Avenue lines referred to therein is as follows:

"The Class A system provides for the taking over of 34.25 miles of lines built under the so-called 'Day-to-Day Agreements,' in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver to us in preference to getting off the street, at say, an estimated cost of \$40,000 per mile."

In the interim between the adoption of the ordinance referred to and April 5, 1920, the date fixed for the electors to vote upon the question of approving the proposition, the Street Railway Commission submitted a communication to the Common Council pointing out the necessity of giving to the electors accurate information as to what the proposition they were to vote upon involved, and asked the Common Council to appropriate the sum of \$10,000 out of the tax collections of the city for the purpose of printing and distributing to all of the electors of the city a sample ballot informing them as to what was involved in such proposition. The request of the Board of Street Railway Commissioners was complied with and \$10,000 was appropriated by the Common Council, with the approval of the Mayor, for the purpose stated, and, in the regular way provided by the charter, bids were called for to print the proposed sample ballots and information explaining the proposition to be voted upon.

In connection with and upon the back of the sample ballot was printed a map of the proposed lines of railway and showing the lines of the plaintiff Company so proposed to be taken over by purchase.

On the bottom of such sample ballot, in bold type, was the following:

"This Official Information on the New Street Car Plan is Issued by B. of St. R. C. (Street Railway Commission) with Approval of Common Council."

and as a part of the same, the financial plan for constructing the proposed street railway system appeared as follows:

"FINANCIAL PLAN FOR "A" AND "B" LINES

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at \$40,000.....	\$1,370,000.00
Fort and Woodward tracks where franchise has expired, 21.25 miles estimated at \$40,000	850,000.00
New tracks in unserved districts, 100.75 miles estimated at \$70,000.....	7,052,500.00
400 new electric motor cars estimated at \$10,000 each	4,000,000.00
150 new trailers estimated at \$5,000 each....	750,000.00
(If the Ford gas car is used, the cost of cars will be reduced about 50 %)	
Car barns, tools, etc.....	1,000,000.00
Total	\$15,022,500.00

This \$15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period. .

The Class "C" lines, consisting of 62 miles, will be developed as soon as "A" and "B" are in operation.

The \$15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

From the sample ballot so printed and distributed to the electors of the city before the election of April 5, 1920, and from the official ballot actually used was omitted the

following part of sub-section 30 of Section 1 of the proposed ordinance:

"and said Board of Street Railway Commissioners shall construct, own, maintain and operate in said City of Detroit . . . a system of street railways," etc.

In other portions of the ordinance the authority to be granted by a vote of the people was stated to be authority "to acquire, own, maintain and operate a street railway system," etc.

Of course, the property to be taken over by the city could be acquired by several means, namely, by construction, purchase, by lease or by condemnation, and the only mandatory provision of the ordinance as to the method to be employed was that omitted from the sample ballot referred to and under the provisions of the charter of the city no property could lawfully be purchased for street railway purposes—until a contract therefor had been negotiated and entered into and this contract submitted to and approved by vote of the electors.

The Corporation Counsel of the City of Detroit, who framed the ordinance and was actively associated with the Mayor and Common Council in submitting the proposition, publicly made the following statement:

"Omission of a contract to purchase the 34.25 miles of D. U. R. 'day-to-day agreement' lines from the Conzens street car plan was not all oversight, Corporation Counsel Wilcox said Saturday, but was not included so the city might be free to order those tracks torn out and replaced with city-built lines.

"He also said that it would have been impossible to present the ordinance divided into sections in which the construction features were separated from the purchase phase of the plan.

" 'It would never pass if so divided,' he explained. 'Some voters who favored the construction of lines by the city might object to a purchase plan, and those who approved purchase might not wish to approve a construction plan.

"The objection to the ordinance which has been made, namely, that it contained no revision (a. c. provision) for the purchase of existing street railway was given careful thought when the measure was drafted,' Mr. Wilcox continued.

"As I recall the language of the charter provision referred to, it means that a contract to purchase a street car 'system' shall be void unless approved by a three-fifths vote.

"It may develop that the city will find it cheaper and more expedient to order the company to remove its tracks from those streets now operated as day to day lines and build the tracks itself.' "—

which verified the allegations of the plaintiff's bill, that there was a marked division of opinion among the electors of the city with reference to the question of construction or purchase, and that the ordinance was so framed and the official communication of the Mayor and statement of financial plan distributed to the electors was intended to convey the impression that only new tracks were to be constructed and the lines with existing tracks were to be purchased, and this was, as stated by the corporation counsel, with a view to securing votes in favor of the proposition of those who were in favor of construction and opposed to purchase, as well as those in favor of purchase and opposed to construction.

The learned Judge disposed of this phase, however, of the plaintiff's case by holding that the official communi-

cation of the Mayor and Common Council submitting the ordinance to it for its consideration and approval, was "unofficial;" that the action of the Street Railway Commission, with the approval of the Common Council, in appropriating tax money and issuing and distributing the sample ballot containing what was called upon the ballot "official information" was "unofficial;" in short, that nothing could be considered by the Court in determining the question of the validity of the ordinance except the original ordinance as adopted by the Common Council.

To approve of such a ruling would be to approve of the most flagrant kind of dishonesty and deception practiced by the Mayor and city officials of the city in order to obtain the approval of their plan which approval they realized could not otherwise be obtained.

REFERRING TO THE THIRD PROPOSITION ABOVE STATED (P. 7):

It is alleged in and by paragraph "6" of plaintiff's bill that the mileage of the lines in Class "A" and Class "B" mentioned in said ordinance is 156.25 miles, and of the Class "C" lines therein is 55.25 miles, being a total of 211.50. That the cost of acquiring the said lines proposed in said ordinance to be acquired would, whatever method of acquisition were adopted, exceed by many millions of dollars the amount of bonds provided for in said ordinance, and would upon the methods and at the estimated costs stated by the Mayor's message, Exhibit 5, exceed the amount of said bonds by nearly four million dollars.

This allegation, like all of the other allegations contained in the plaintiff's bill, is, by the action taken by the

defendant municipality in moving to dismiss the bill, for the purpose of the case admitted to be true, and we contend that under the allegation referred to showing that the cost of the proposed improvement would exceed the appropriation asked for bonds by four million dollars, the entire proceedings are rendered invalid.

It was further alleged in paragraph (9) of the plaintiff's Bill of Complaint as follows:

"(9) That included in the lines proposed to be acquired in said ordinance, is a line described in paragraph 10 thereof, which runs in part through the City of Highland Park, and another line described in paragraphs 23 and 25 thereof, running in part through the Village of Hamtramck, which city and village are both included within the exterior boundaries of said City of Detroit. That said proposed trackage in the City of Highland Park and in the Village of Hamtramck, particularly that in said City of Highland Park, are important links in the municipal street railway system proposed by said ordinance and essential to the operation and efficiency of the remainder thereof. That over the streets covered by said proposed trackage in Highland Park and Hamtramck there is no existing street railway franchise, and that under the charter of the City of Highland Park, to which plaintiff craves leave to refer with the same force and effect as if the same were herein recited, and under the general laws of the State of Michigan there is no power or valid authority to grant such street railway franchise to the City of Detroit, and therefore no authority under which the right to construct and

operate street railway trackage in either the City of Highland Park or said Village of Hamtramck can be obtained."

With reference to the allegations contained in paragraphs 6 and 9 referred to

See

Beers v. City of Watertown

(Sup. Ct. So. Da.)

177 N. W., 502.

where Mr. Justice Whiting, speaking for the Court, said:

"It stands admitted by the demurrer that, because of the fact that the contract under which the streets of defendant city are now lighted is to soon expire, and because the city needs electric power for its city pumping plant, the defendant council contemplates the immediate construction of an electric system 'for the purpose of lighting the streets . . . and furnishing power for pumping water;' that the electors voted in favor of issuing the bonds under the belief that the amount authorized was sufficient with which to provide the complete system then contemplated, and that the money derived therefrom would be used to provide a system furnishing electricity for all three purposes, municipal, industrial and domestic; that the amount of bonds authorized, together with all money available for such purpose, is wholly inadequate with which to provide a system of electric lighting for all three purposes; and that the council are planning to provide a system which will furnish light and power solely for municipal purposes. The question thus presented is whether, when the statute authorizes a council to provide 'any system or part of system of lighting. . . ' and it has

asked for bonds with which to provide a complete system for three purposes, it can properly use the money from such bonds to provide a system for but one of the purposes, knowing before it starts to provide such system that it cannot provide the complete system voted for. If it cannot properly do this, and the tax payers would be entitled to have such use of the money restrained, then the issue of bonds should be restrained. . . .

"It may be that facts exist which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. *The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors.* To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes and when the council intended to provide a system radically different than what the electors were led to expect would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized. The facts before us are analogous to those before the court in *Tukey v. Omaha*, 54 Neb. 370; and in line with the holding in such case we hold that for the council to use the money as its demurrer confesses it intends to would be unlawful and should be restrained. But in the present case the bonds have not been issued. If they should be issued and come into the hands of innocent par-

ties, the rights of the tax payers of defendant city might be jeopardized. It follows that the council should be enjoined from issuing and selling such bonds."

The action of the learned District Judge, in dismissing the plaintiff's bill was not only special and peculiar but was extraordinary in that he for a second time ruled directly in opposition to the express ruling of this Court in the Denver Water Works case, 246 U. S. 178, and the so-called Kronk Ordinance case, 248 U. S., 429.

The action of the learned District Judge was also special and peculiar, as well as extraordinary, in that in dismissing the plaintiff's bill of complaint upon a motion to dismiss, this being substantially a demurrer to the bill for want of equity, it granted defendant affirmative relief without any answer or cross bill or other basis for such relief.

Paragraph 1 of such decree contains the following:

*"That whatever contract rights, privileges and franchises said plaintiff company may have had in the above described streets have expired, and the defendant city may require said company to cease its service upon such streets * * * and remove its property therefrom upon giving the notice and time for removal, as required under the terms of the decree entered in the case of City of Detroit vs. Detroit United Railway, pursuant to the opinion found in 172 Mich., p. 136."*

The Mayor and Common Council and Street Railway Commission have under the claimed authority of the

ordinance referred to and the approval thereof, as stated, issued approximately \$1,750,000 in face value of the bonds claimed to be authorized thereunder and have sold the same to the Board of Sinking Fund Commissioners—a department of the city government composed of the Mayor and City Treasurer and City Controller and the members of the Common Council—and have let contracts that will require the disbursement of practically the entire amount of the proceeds of such bonds.

They have also authorized a further issue of \$1,000,000 of such bonds for the purpose and with the intention of making further contracts that will require the expenditure of the proceeds of the sale thereof.

That all of such bonds contain the following recital:

“This bond is one of a series aggregating the sum
of Seven Hundred Thousand Dollars
(\$700,000)

issued pursuant to and in conformity with the Constitution and Statutes of Michigan, the Charter of the City of Detroit, and such votes, assents, ordinances, resolutions and proceedings duly adopted and taken, as are required thereby.

“It is hereby certified and recited that all acts, conditions and things precedent to and in the issuance of this bond have been properly done, happened and been performed in regular and due time, form and manner as required by law and that this bond, together with all other indebtedness of the city of Detroit, does not exceed any constitutional, statutory or charter limitation of indebtedness.

The faith and credit of the City of Detroit are hereby pledged for the punctual payment of the principal and interest of this bond.”

which would probably render such bonds in the hands of bona fide purchasers binding obligations against the city, notwithstanding the fraudulent action of the municipal authorities taken to procure the authorization of the same.

It therefore becomes vitally important that either this cause be advanced for hearing at an early day or that an injunction be issued by this Court restraining the further disbursement of the proceeds of said bonds, or the further issue of such bonds.

Respectfully submitted,

Elliott G. Stevenson,
Attorney for Plaintiff in Error.

John C. Donnelly,
William L. Carpenter,
P. J. M. Hally,
H. E. Spalding,

Of Counsel.

EXHIBIT "A"

IN THE SUPREME COURT OF THE UNITED STATES.

October Term.

DETROIT UNITED RAILWAY,
a corporation,

Plaintiff in Error,

vs.

CITY OF DETROIT,
a Michigan corporation,

Defendant.

No. 492.

UNITED STATES OF AMERICA,
Eastern District of Michigan,
Southern Division.

ss.

A. D. B. VANZANDT, being duly sworn, says:

That he resides in Birmingham, Michigan, and has been for many years connected in a reportorial and editorial way with newspaper publications in said city.

That he has examined the records of the City controller of the City of Detroit and finds that contracts were let by the Board of Street Railway Commissioners after having been approved by the Common Council, for the purchase of materials and construction of work connected with the proposed municipal street railway system referred to in the plaintiff's Bill of Complaint in the above

entitled cause, and that the amount of such contracts approximates One million eight hundred and seventy-five thousand dollars (\$1,875,000).

That in four (4) lots public utility bonds aggregating in amount Seventeen hundred and fifty thousand dollars (\$1,750,000) have been sold—\$1,650,000 to the Board of Sinking Fund Commissioners of the City of Detroit and \$100,000 to the City Treasurer of the City of Detroit—such bonds being claimed to be authorized by the ordinance adopted by the Common Council of the City of Detroit on January 27, 1920, and approved by a vote of the electors of the City on April 5, 1920, with reference to the construction of such municipal street railway system. That three of such lots of bonds were purchased by the Board of Sinking Fund Commissioners in amounts of \$200,000, \$700,000 and \$750,000 (\$1,650,000 in all).

That at a meeting of the Board of Street Railway Commissioners held August 20, 1920, a resolution was adopted calling for the issue of One million dollars (\$1,000,000) additional of such bonds and it is proposed by said Commission to continue making contracts in connection with the construction of such municipal street railway system that will require the disbursement of the proceeds of the sale of such million dollars (\$1,000,000) of additional bonds.

A. D. B. Vanzandt.

Subscribed and sworn to before me this 2d day of October, A. D. 1920.

N. J. Fleming,

Notary Public, Wayne County, Michigan.

My commission expires Feb'y 24, 1923.
(Seal)

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JAMES D. MA

IN THE
Supreme Court of the United States.

October Term, 1920
No. 402

DETROIT UNITED RAILWAY,

Appellant,

vs.

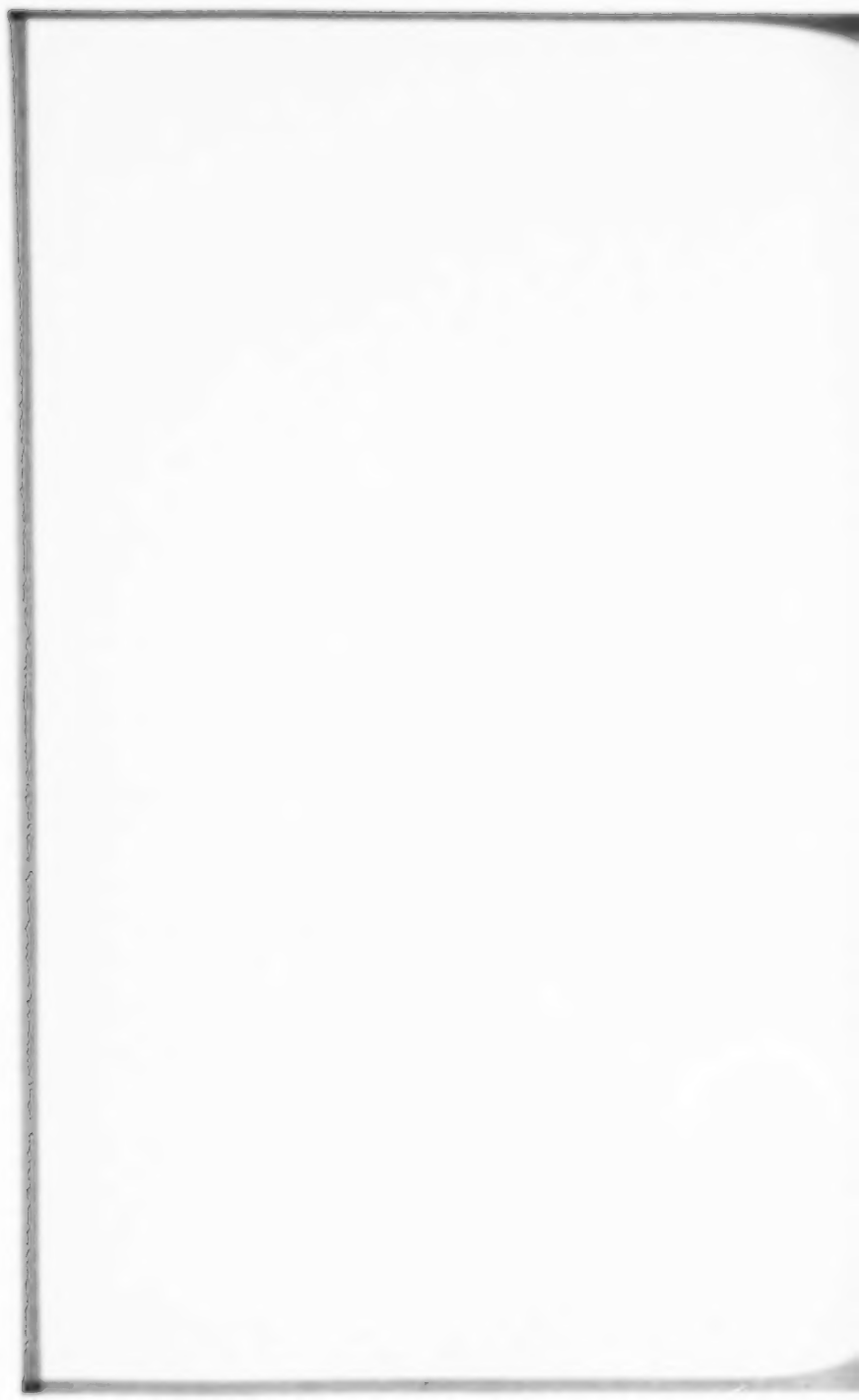
CITY OF DETROIT, et al,

Appellees.

BRIEF FOR APPELLANT IN OPPOSITION TO
MOTION TO DISMISS OR AFFIRM.

CHARLES E. HUGHES,

Of Counsel for Appellant.



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IN THE
Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 492.

DETROIT UNITED RAILWAY,
Appellant,

vs.

CITY OF DETROIT, *et al*,
Appellees.

**BRIEF FOR APPELLANT IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM.**

The Detroit United Railway, the appellant, by its bill of complaint presented a case arising under the Constitution of the United States, (Transcript, pp. 20, 21). The District Court held that it had jurisdiction and decided the constitutional question against the contention of the appellant (Opinion, Transcript, pp. 57-60; Decree, pp. 66, 67). This appeal has been taken and the appellee, City of Detroit, now moves to dismiss or affirm.

FIRST: The motion to dismiss should not be granted.

To grant this motion would be to hold that *this* Court has no jurisdiction. This would be to leave the decree of the District Court in full force and effect. The District Court, not only in its opinion, but by the decree itself, held that a question was presented under the Fourteenth Amendment of the Constitution of the United States (Transcript, p. 66). Thus holding, the District Court determined the constitutional question in favor of the appellee. To dismiss the appeal would be to deprive the appellant of the right to review this determination. But that right of review has been expressly granted (Judicial Code, Sec. 238). The appellee cannot obtain a decree denying the constitutional right and preclude the consideration of the question by this Court.

SECOND: The motion to affirm is without merit.

(1) *It is manifest that the motion to affirm cannot be granted in the view that the District Court was without jurisdiction.*

The District Court decided that it had jurisdiction and the decree so determined. To affirm the decree would be to affirm this determination. It would be to leave the decree standing as an adjudication that the Court had jurisdiction and as an adjudication, in that view, upon the merits. It would be to affirm a decree not only passing upon the merits of the bill, but giving to the de-

pendants affirmative relief by an affirmative adjudication with respect to the appellant's rights (Transcript, p. 66). If it could be deemed that the District Court was without jurisdiction, the remedy would be not to affirm, but to reverse the decree and direct the dismissal of the bill upon the ground of lack of jurisdiction.

But, plainly, the District Court did have jurisdiction, the allegations of the bill, as the District Court found, being adequate to raise the constitutional question.

Home Telegraph & Telephone Co. v. Los Angeles, 227 U. S. 278, 287, 288.

Cuyahoga Power Co. v. Akron, 240 U. S. 462.

Denver v. Denver Union Water Co., 246 U. S. 178.

Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446.

Detroit United Railway v. Detroit, 248 U. S. 429.

(2) *Nor can it be said that the motion to affirm should be granted in the view that the case presented is so clearly without merit that no further argument is required.*

On the contrary, we submit that an examination of the record will show not only that the appellant should be heard in ordinary course, but that the appellant has made a case entitling it to constitutional protection and that the decision of the District Court was erroneous.

It is at once apparent that, as the Court below had jurisdiction, all questions were before it, lo-

cal as well as Federal (*Siler v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 191; *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 303). The District Court passed upon both questions (Transcript, p. 67). It would be difficult to suggest a more serious question than the validity of the submission to the voters of the City of Detroit of the ordinance involved, as the Court cannot fail to see that that submission was made by the City authorities, in the exercise of the power conferred upon them by the State, in a misleading and deceptive manner by misrepresenting to the electors the effect of their vote in favor of the ordinance. The appellee makes no satisfactory answer to the allegations of misrepresentation in fact, but, in substance, defends upon the ground that such official misrepresentations, having had their effect, cannot be considered in attacking the validity of the submission. This question has never been decided by this Court and there is no decisive authority, of which we know, in opposition to our contention. That contention involves the most fundamental principle of fairness in official action in conducting a *referendum*. Certainly, if it were ever to be held that, through the action of the officers entrusted with the duty of submission, electors could be misled as to the effect of their vote and that there was no remedy to those whose rights were thus jeopardized, it would be a conclusion only to be reached after full argument and the most deliberate consideration. We apprehend that such a conclusion never will be reached. The more important the *referendum*, the more important that the submission be made in a proper manner.

Then, armed with the authority claimed to exist by virtue of the popular vote thus obtained, the

effort has been made to invade the rights of the appellant, to deprive the appellant of its property, not by due process, but by illegal action, by an abuse of process. It is like the case described in *Home Telegraph & Telephone Co. v. Los Angeles, supra*, where those in possession of State power used that power "to the doing of the wrongs" which the Constitution forbids. Unquestionably, the rights of a municipality are to be jealously safe-guarded, and, equally, the rights of private property, and of those who have made their investment in public utilities, are not to be overthrown. There is, of course, a just balance, but that balance, as we conceive it, is not to be maintained if such an assault and perversion of State power as is presented in this case is to be permitted without redress.

Two questions are presented, (a) as to the rights of the appellant, and (b) as to the course taken by the City.

(a) *The rights of the appellant.*

The appellee insists that as to portions of the Fort Street line and Woodward Avenue line, embraced within the City's plan, the appellant's franchises have expired. Reliance is placed upon the decree (with respect to portions of the Fort Street line) entered February 28, 1913, and affirmed by this Court (see *Detroit v. Detroit United Railway*, 229 U. S. 39; Transcript, p. 5, Ex. 4, p. 42).

But it is alleged in the bill of complaint, and admitted by the motion to dismiss, that the appellee did not see fit to enforce the decree in the Fort Street case or to require the appellant

to cease its operation in those streets in which franchises had expired, but acquiesced in the continued operation of these lines. Thus, a new situation was created after the decree in the Fort Street suit.

The City recognized that the continued operation of these lines by the appellant was absolutely essential to the public interest. The industrial life of the great city of Detroit was absolutely dependent upon this continued operation. At that time the City had no power to construct municipal lines and to compel the appellant to cease operation would be simply to end transportation and throttle the City's business. Short of famine or pestilence, no greater calamity could be imagined than to destroy the circulatory system of the City. It was all very well for the City to obtain its decree in 1913, but it was a very different thing for the City to compel the appellant to discontinue operation and hence it pursued another and what it evidently thought to be not only a better but a necessary course.

Manifestly the City could not blow hot and cold. Appellee seems to forget that in such matters there are reciprocal rights and interests. When the City obtained its decree that the appellant was without rights in the streets where the franchises had expired, and should be required within a time to be fixed to remove its property from the streets, this determination necessarily involved that the appellant was under no further obligation to continue its service. If the City could require the removal of its tracks, the appellant had the right to remove them. As was said in *Denver v. Denver Union Water Co.*, 246 U. S. 178, 190, if the condition were such as to leave

"the company actually without the right to maintain its plant in the City thereafter", then "necessarily this would leave it at liberty to discontinue the service at will". In these circumstances the appellant elected to continue the service as a public undertaking and the City chose to permit, indeed to require, its continuance. This, however, could not happen without giving rise to new rights and obligations, as this Court has definitely decided to be the result in such cases.

The facts are not in dispute, being alleged in the bill and being admitted by the motion to dismiss. That the appellant's railway system is substantially the only means for transporting large portions of the employees in the industries within the City between their homes and places of employment, that the street railway system is a single unit, and that the separation of the lines and parts of lines here involved "would paralyze the industrial and business life of said City, throw thousands of its residents out of employment, and shut down its industrial plants and factories" is conceded (Transcript, p. 5). It was in this view that the City required continued operation of the lines in question.

Some of the more important facts detailed in the bill of complaint may be briefly summarized. Since the expiration of the franchises on the Fort Street lines, there has necessarily been expended by the appellant, with the approval of the City, for the proper operation of the Fort Street lines and the construction of additions and betterments, about \$1,500,000, of which nearly \$900,000 was expended on the lines involved in the decree of February, 1913, and by far the larger part of this amount was expended since that decree (Transcript, p. 6). Large amounts have been expended,

in similar circumstances, on the Woodward Avenue line since the alleged expiration of franchises (*id.*, pp. 6, 7). It appears that approximately \$2,800,000 has been expended, with the approval of the City, upon lines as to which it is claimed franchises had expired in order to secure continued operation for the benefit of the people of the City (*id.*, p. 8).

In August, 1918, the so-called Kronk Ordinance was passed by the Common Council of the City (*id.*, p. 6; Ex. 4-B, *id.*, p. 47). This prescribed rates of fare for the appellant's entire City system, including both franchise lines and those on which the previous term franchises had expired. This ordinance was before this Court in *Detroit United Railway v. Detroit*, 248 U. S. 429. In that case the District Court had taken the view that "the power to compel the company to remove its tracks from the lines involving the non-franchise roads included the right to fix terms of continued operation upon such lines, whether remunerative or not". That view was held by this Court to be wrong. It was held that the case was ruled in principle by the *Denver* case. The Court said that instead of compelling the Company to cease its service and remove its tracks from the non-franchise lines within the City, the City had enacted an ordinance "for the continued operation of the company's system, with fares and transfers for continuous trips over lines composing the system whether the same had a franchise or not", and that this action "contemplated the further operation of the system, and fixed penalties for violations of the ordinance" (*id.*, p. 435). The Court further said:

"It is clear that the city might have taken a different course by requiring the company to take its tracks from the non-franchise lines; it elected to require continued maintenance of the public service, doubtless because it was believed that it was necessary in the existing conditions in the city to continue for a time at least the right of the Railway Company to operate its lines. *This amounted to a grant to the company for further operation of the system, during the life of the ordinance*". Italics ours. (*Id.*, 436.)

Not only did this ordinance recognize the right and the duty of the appellant to continue its service, but in June, 1919, the City began a suit against the appellant in the State Court to compel it to operate certain lines where a strike had intervened. The Court decreed, at the City's instance, that the appellant should operate its entire system for a period specified and at a rate of fare prescribed and the City Council approved the arrangement (Transcript, p. 6, Ex. 4C, 4D, 4E; *id.*, pp. 48-51).

It is then idle to contend that the City is in a position arbitrarily at its will to compel the appellant to discontinue its service upon its lines, whether or not the lines were those on which franchises had expired prior to these arrangements.

Suppose the appellant undertook to discontinue any of these lines, what would the City say? Would it not immediately be contended that the Appellant had entered into an undertaking to serve the public and must comply with its undertaking? And if there is such an obligation there must be a correlative right. Such matters are of the gravest consequence. This is undoubtedly an important case to all the parties concerned, but the principle involved is of transcendent import-

ance, not only to public service corporations but to the communities they serve, for fundamentally the question is whether such communities may be deprived of service at will.

In the *Denver* case (246 U. S., p. 190), the Court found itself unable to conclude that the Water Company could discontinue its service at will, or that in such a view the City Council could arbitrarily compel it to discontinue its service, and said:

"The alternative, which we adopt, is to construe the ordinance" (that is, the ordinance regulating rates after the expiration of the franchise) "as the grant of a new franchise of indefinite duration, terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver. It recognizes the dependence of the City upon this plant, by necessary implication confers upon the company whatever privileges may be necessary to enable it to continue serving the public, in effect requires it to furnish water, and in terms prohibits it from exceeding the specified rates".

This is the principle which this Court said was applicable in *Detroit* in view of the municipal action taken since the expiration of the franchises (248 U. S., p. 435). That is, reciprocal rights and duties have been created. What then is the period during which such rights and duties are to continue? Is not the very foundation of the decision as to the existence of these reciprocal rights and duties such as to preclude the view that they are to continue simply at arbitrary will? The term may be indefinite, but it is measured by proper regard for the public interest. The undertaking of the appellant is to serve while that service is

required in the public interest, and the grant and requirement of the City which spring, as this Court said, by "necessary implication" from the admitted circumstances, have a similar duration. Thus neither is remediless when arbitrary action is attempted. This Court said that the grant was "terminable either by the City or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver" (246 U. S., p. 190).

The City of Detroit now claims that it has received authority to construct municipal lines. No one asserts that the City had any such authority prior to the special election of April, 1920. During the period prior to that election, it was admittedly impossible for the service to be discontinued with any regard for the public interest. If any new situation has been created, it is due solely to the special election of April, 1920, that is, to the submission and alleged adoption of the ordinance, the validity of which is challenged in this suit.

Moreover, not only was the operation of the lines in question continued after the alleged expiration of the franchises in such circumstances as to import an undertaking and a grant, as above stated, but with the approval, and virtually under the requirement, of the City in order to maintain the service, large amounts of money have been appropriately expended by the appellant upon certain of these lines. The appellant has a manifest equity that its continued operations should not be impaired or destroyed without proper reimbursement for these outlays made on the faith of the continued right to conduct the service. There is no principle which permits a municipality to escape such an equitable obligation (see *Essex v. New England Telegraph Co.*, 239 U. S. 313, 321).

And, in view of what has taken place since the decree of 1913, due process requires a hearing and judicial determination before the appellant can be put off the streets (see *Ramsdell v. Maxwell*, 32 Mich. 285).

It is enough for the present purpose, so far as this motion to affirm is concerned, to show the seriousness of these views, but it is easy to go further and expose the fallacy of the opposing contentions.

I. Thus it is said that there is a complete answer in the fact that the Michigan constitutional prohibition adopted in 1908 provides that there shall be no grant of a public utility franchise which is not subject to revocation at the will of the City unless such proposal shall have first received the affirmative vote of three-fifths of the electors. But there was a similar situation in the *Denver* case. For the constitution of Colorado (as amended in 1902) empowered the City of Denver to construct, purchase and operate water works and provided that "no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors" (Article XX, Secs. 1, 4; see *Denver v. New York Trust Co.*, 229 U. S. 123, 129). But this constitutional provision has no application to a grant by necessary implication for the protection of the public interest such as that found to exist in *Denver v. Denver Union Water Co.*, 246 U. S. 178, 190. Such a franchise is not within the intendment of the prohibition. It is an indeterminate grant to protect the public and carries with it the duty of service, both being terminable

"at such time and under such circumstances as may be consistent with the duty" that the company and the City owe to the inhabitants.

II. Again, it is said that in ordinances and resolutions it has been provided that each party should reserve all its rights. But what are these rights? The same argument applied in the *Denver* case, for there the ordinance regulating rates after the franchise had expired, as the dissenting opinion pointed out, set forth that the Water Company was "without a franchise and a mere tenant by sufferance of the streets of the city and county of Denver" and it was said that the ordinance was passed "without in any manner recognizing said The Denver Union Water Company's right to occupy the streets of the city and county of Denver, or to continue its service as a water carrier, but for the purpose of regulating and reducing the charges made by it", etc. (246 U. S., pp. 195, 196). But despite this language, the Court construed the action taken by the City as necessarily implying a grant. The Court called attention to these recitals, but said that "the enacting provisions, in the terms employed and by necessary intendment, are inconsistent with these declarations, and must be taken to override them" (*id.*, p. 189). And the same conclusion was reached, despite such recitals, in the case of this appellant in *Detroit United Railway v. Detroit* (248 U. S., p. 435).

III. Again, it is argued by the appellee that there can be no estoppel "where both sides have equal knowledge of the lack of power". But there was no lack of power, and that in such circumstances the City may be held to its fair obliga-

tion, whether it is deemed to be based upon grant or upon estoppel, is quite clear (see *Essex v. New England Telegraph Co.*, 239 U. S. 313, 321; Dillon on Municipal Corporations, 5th Ed., Vol. 3, Sec. 1194).

It cannot be gainsaid that the appellant was entitled to constitutional protection against improper interference in the exercise of its rights. This was the point of both the *Denver* and the *Detroit* cases above cited, for in each there was a constitutional right to protection against confiscation, although the City insisted that it could do as it pleased because the franchises had expired. The Court held to the contrary, as the Company was rendering under an implied grant a proper service and any action regulating its service had to be consistent with constitutional limitations. So here, the appellant is constitutionally entitled within the sphere of its lawful operations to be free from molestation and coercion through the wrongful use of State power by the City authorities.

(b) *The action taken by the City.*

As has been said, prior to the special election of April, 1920, when the ordinance in question was submitted, the City was powerless to engage in the enterprise itself. Upon the admitted facts, the City could not arbitrarily disrupt the service. The appellant was within its rights until a situation arose in which the essential service to the inhabitants could be safeguarded by some municipal plan. The question arises whether such a situation has developed and this, so far as this aspect of the question is concerned (and apart from the duty of the City to make equitable reim-

bursement for the outlays above mentioned made by reason of the City's insistence) involves the question of the validity of the submission at the special election in April, 1920, of the proposal for the construction of municipal lines. The City now insists that, by virtue of that submission, an ordinance has been adopted by which it has power to construct municipal lines and hence to compel the appellant to discontinue its service upon the lines embraced in the ordinance. In this view the City claims to be possessed of the power to put the appellant off the streets with respect to essential parts of the appellant's system and to threaten the appellant with this ejectment unless it will sell its property for an inadequate compensation (Transcript, pp. 20, 21).

The applicable principle with respect to the protection accorded by the Fourteenth Amendment was thus stated in *Home Telegraph & Telephone Co. v. Los Angeles*, 227 U. S. 278, 287:

"Here again the settled construction of the Amendment is that it pre-supposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant and the Federal judicial pow-

er is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

If the submission was illegal, if it was deceptive and misleading and the ordinance was not validly adopted, then the proceeding of the City in its interference with the appellant, and its attempt to coerce it to part with its lines, is simply the use of State power for the prohibited purposes and an invasion of the appellant's rights without due process of law. The question necessarily arises, in what manner did the City acquire its asserted power? How was this ordinance submitted to the voters? What is the necessary conclusion as to the validity of the submission?

There is no controversy as to the controlling facts. The Constitution of the State of Michigan, as revised in 1908, provides (Article 8, Sec. 25) that no city shall acquire any public utility unless the proposition shall have first received the affirmative vote of three-fifths of the electors of the city voting thereon at a regular or special municipal election.

The Home Rule Act of Michigan, enacted in 1915 (Section 4, subdivisions (i), (j) and (k), 1 Comp. Laws Mich. 1915, Sec. 3307) gave each city authority to provide in its charter for the acquisition of public utilities, the procedure being, of course, subject to the constitutional requirement. The present charter of the City of Detroit, adopted in 1918, in the chapter relating to municipal ownership and operation of a street railway system contains the following provisions (Chapter XIII, Sections 6, 7, 8; Transcript, p. 18):

"Sec. 6. It shall be the duty of said board to proceed promptly to purchase, acquire or construct and to own and operate a system of

street railways in and for the city, and as soon as practicable to make said system exclusive. Said board shall, whenever it deems it necessary, build extensions and new lines. Such extensions and new lines shall be first approved by the common council.

"Sec. 7. Said board may purchase or lease, or by appropriate proceedings prescribed by law and in the name of the city condemn all or any part of the existing street railway property in the city, and in like manner said board shall have power to acquire a street railway property without the limits of the city as prescribed by law, if the board shall determine; or it may make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said board shall construct, own, maintain and operate in said city for said city and within a distance of ten miles from any portion of its limits as aforesaid, a system of street railways beneath, upon and above such streets and other places in the city and outside thereof as aforesaid as the common council shall from time to time elect.

"Sec. 8. Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote."

It is apparent that the City obtains no authority to purchase, lease or condemn existing street railway property unless three-fifths of the electors approve the contract to purchase or lease or the plan to condemn, at a regular or special election. In the present case it is admitted, and the Court

below has held, that the ordinance in question did not empower the City to purchase, lease or condemn any portion of the railway property of the appellant, as no contract to purchase or lease or plan to condemn has been submitted to the voters (Transcript, p. 67).

The question, then, is with respect to the submission of the proposition by the City to construct trackage on streets where there is existing trackage belonging to the appellant.

It is at once perfectly plain that such construction would in any event cause considerable inconvenience, and it would be remarkable if the citizens were willing, without any plan for purchase, lease or condemnation being submitted, to authorize the tearing up of existing tracks and the construction in their place of municipal trackage. Such a proposition is on its face insensible.

Then, we find that the submission took an ambiguous, misleading and deceptive form, so as to lead the electors to suppose that the construction would be only where there were *no* existing lines and that there would be a purchase where there *were* existing lines. This was the character of the submission, although no plan for purchase or condemnation was properly submitted.

The answering argument, in substance, is that the Court cannot deal with the manner of the submission, no matter how misleading or deceptive it was, but that the Court is bound simply to take the face of the ordinance and to indulge the conclusive presumption that the voters gave their approval with a full understanding of its purport.

Fortunately, there is no such absurd and artificial rule of law. The City authorities were not acting outside their power in formulating the submission. To have a valid submission it was nec-

essary that they should act validly within their power. The position taken by the District Court that the motives of electors and legislators cannot be inquired into is beside the point and its statement that the acts complained of were "unofficial acts" is, we submit, erroneous and shows an entire misconception of the case.

This is apparent from the fact that prior to this special election and by the amendment of the Charter of the City of Detroit, adopted April 7, 1919 (Title III, Chapter I, Sec. 13), the administrative powers and duties of the Common Council of the City were defined so as to embrace the following:

"(e) To submit to the electors of the City of Detroit at any election, general or special, propositions by law required or permitted to be submitted to said electors, bonds by law required or permitted to be submitted to said electors, questions or matters by law required or permitted to be submitted to said electors, and all propositions, questions or matters upon which said Common Council desires the vote of said electors."

The Common Council thus had the authority to submit the proposition to the electors, and the most elementary principle requires that the Common Council in exercising this authority should make the submission fairly and in a manner not calculated to mislead and deceive the voters.

In thus providing for the submission, it was also plainly within the power of the Common Council to give to the electors convenient sample ballots with information as to the purport of the submission. To say that the Common Council may submit to the electors propositions and not do those ordinary and appropriate things which go with

the submission in order to make it intelligible, would be, as it seems to us, a most extraordinary and unwarranted ruling. It is alleged in the bill of complaint that the City and Mayor and Common Council caused to be prepared and distributed to the voters some weeks prior to the election of April 5, 1920, what purported to be a sample ballot and setting forth the proposed plan (Transcript, pp. 12, 13; see Ex. 6, sample ballot opposite p. 52). This was designated on its face as "Official Information". It was issued officially by the Common Council under its authority to make the submission.

This "official information" set forth what was called the "official plan for 'A' & 'B' Lines", as follows:

"FINANCIAL PLAN FOR 'A' AND 'B' LINES.

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at \$40,- 000	\$1,370,000.00
Fort and Woodward tracks where franchise has expired 21.25 miles estimated at \$40,- 000	850,000.00
New tracks in unserved dis- tricts, 100.75 miles estimated at \$70,000	7,052,500.00
400 new electric motor cars esti- mated at \$10,000 each.....	4,000,000.00
150 new trailers estimated at \$5,000 each	750,000.00
(If the Ford gas car is used, the cost of cars will be reduced about 50 per cent.) -	
Car Barns, tools, etc.....	1,000,000.00
Total	<u>\$15,022,500.00</u>

This \$15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period.

The Class 'C' lines, consisting of 62 miles, will be developed as soon as 'A' and 'B' are in operation.

The \$15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

The statement was accompanied by a diagram showing the various lines to which reference is made. It was thus stated in so many words that the "*present trackage*" was to be "*taken over*" at cost less depreciation. The amount to be paid for the present trackage thus to be taken over was specified. The same purpose as to taking over is indicated as to the "Fort and Woodward tracks". There was no statement that there was to be any construction where there was existing trackage. It was not stated that there was to be construction if purchase or taking over failed. Where there was *no* existing trackage, the reference was to the "*new tracks*" in unserved districts. It was perfectly clear that any voter would be entitled to assume from this official information that the existing trackage was to be taken over and to this extent the lines were not to be constructed.

This view followed what the Mayor had said in his message proposing the ordinance as it appeared in the Official Bulletin of the proceedings of the Common Council on January 6, 1920, where the Mayor said:

"The Class A system provides the taking over of 34.25 miles of lines built under the so-called 'day-to-day' agreement, in which the

city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, *which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at say, an estimated cost of \$40,000 per mile*" (Italics ours; Transcript, p. 12; Ex. 5, p. 52).

It is without avail for it to be said, as is stated in the Mayor's affidavit which the appellee undertakes to submit, that certain lawyers said, in the course of the campaign, that the submission was not valid for the purpose of a purchase. For the point is that the official information given to the voters by the Common Council in connection with the submission, and upon which they were entitled to rely, was that the plan which they were asked to approve involved no construction where there was existing trackage, but that in such case it was the purpose to take over the existing lines on terms advantageous to the City. The ordinance itself was ambiguous in its language, for it spoke of authority "to acquire, own, maintain and operate" (Transcript, Ex. 3, p. 27).

Thus, while it is now admitted (see Appellee's Brief on this Motion, p. 9), that the ordinance "did not in any manner authorize the acquisition of plaintiff's property in said streets" (Fort Street and Woodward Avenue), for the reason that the charter required the submission of a definite contract to purchase or to lease, or of a plan to condemn, and that the submission in question was not adequate for this purpose, still it was officially

represented to the voters that the proposition for construction was for the purpose of building lines where there was *no* existing trackage and that it was the plan to purchase and take over the lines, on advantageous terms, where there *was* existing trackage. The amount of the bond issue, as the official information showed, was computed upon this basis. If this was not a misleading and deceptive submission, we do not know what would be properly so described.

The City did not arm itself in a proper manner with power to construct. Its authorities abused the State power confided to them through an improper submission, and, on the basis of the authority thus claimed to have been obtained through the vote of the electorate, it is now sought to coerce the appellant into parting with its lines at an inadequate compensation.

The City, in effect, says to the appellant, "We will put you off the streets because now we have power to construct and are entitled to construct in the public interest. You will have no day in court, you must get off the streets when we demand it. If you do not like this course we will take your property for such sum as we are willing to pay. Agree to our terms or your property will be destroyed".

It thus becomes obviously necessary to inquire, Is this a proper action by the City in the exercise of State power conferred upon it? Is this due process of law or is it a proceeding without warrant in due process, through a wrongful exercise of State power, to subvert the rights of the appellant?

When the appellant went on with its service, as it was essential to the interests of the City that

it should go on, and the City acquiesced in its course and in truth required the appellant to continue to render the service, the appellant obtained the right to continue, and became entitled to protection in its operations, until by a lawful exercise of State authority, and by the doing of manifest equity in appropriate reimbursement, the City would be entitled to supply the necessary service by some municipal plan. The State had conferred upon the City authority to purchase and acquire municipal lines, but had imposed conditions that the consent of the electorate should be obtained in the manner specified. Instead of obtaining the consent of the electorate in a proper manner, the City authorities abused this State power to make a misleading and deceptive submission and obtain an apparent consent of the electorate influenced by inaccurate and misleading official information in the course of the submission.

To permit the City to proceed, on the assumption of a power thus acquired, to coerce the appellant and to drive it off the streets unless it will consent to part with its lines at an inadequate price, would be suffer the appellant to be deprived of its property without due process of law. It would constitute an abuse of the power conferred by the State just as clearly as an attempt to impose confiscatory rates. It would be a case, within the principle announced by this Court, "where the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong-doer". The State power here lodged with the City authorities was to obtain consent from the electorate for the purpose of construction. That State power was abused and an apparent consent was wrongfully obtained. And, then,

through this pretended exercise of State power the appellant is placed under duress and the destruction of its property is threatened.

We submit that the case calls for the granting of the protection accorded by the provisions of the Constitution of the United States and that the appellee's motion should be denied.

Respectfully submitted,

CHARLES E. HUGHES,
Of Counsel for Appellant.



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IN THE
Supreme Court of the United States

OCTOBER TERM 1920.

DETROIT UNITED RAILWAY,
Appellant,

vs.

No. 492.

CITY OF DETROIT, et al.,
Appellees.

APPELLANT'S BRIEF OPPOSING MOTION TO
DISMISS OR AFFIRM.

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CONWAY BRIEF COMPANY
DETROIT, MICH.

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**APPELLANT'S BRIEF OPPOSING MOTION TO
DISMISS OR AFFIRM.**

Appellee, the City of Detroit, moves to dismiss or affirm or advance. We have no objection to the case being advanced, indeed, we wish it advanced and have already made a motion to that effect, but we do object to the granting of the motion to dismiss or affirm.

Before discussing the propositions urged by appellee, we desire to present an important question not considered or discussed in appellee's brief.

IS THIS A CASE WHICH CAN BE DISPOSED OF BY MOTION TO DISMISS OR AFFIRM?

It is clearly not a case which can be disposed of by motion to dismiss. It is an appeal from the District Court in a case involving the application of the Constitution of the United States, and that appeal is expressly authorized.

Section 238 of the Judicial Code reads:

"Appeals and writs of error may be taken from the District Court * * * in any case that involves the construction or application of the Constitution of the United States."

Is it a case which can be disposed of upon a motion to affirm?

The ground upon which appellees insist that it can, is stated as follows:

"Appellee moves to affirm the judgment of the District Court of the United States for the Eastern District of Michigan, for the reason that it is manifest that the Court below had no jurisdiction and that the appeal is taken for vexatious reasons only, and not because of merit in the questions and because the questions involved are so frivolous as not to need further argument."

As the District Court upheld its jurisdiction and granted appellee's motion to dismiss upon the ground that the bill stated no case, it is manifest that the decree cannot be affirmed upon the ground that the Court lacked jurisdiction. That decree is a bar to another suit. If the Court did not have jurisdiction of the case the decree must be reversed.

Can the decree be affirmed upon the ground that the District Court had jurisdiction and the bill did not state a case for equitable relief?

Here, too, is encountered an insuperable objection arising from the remarkable character of the decree entered by the District Court upon appellee's motion. That decree not only dismisses plaintiff's bill for lack of equity, but grants the appellee, the City of Detroit, affirmative relief in the following language; quoted from paragraph 2 of the Decree: (R. pp. 66-67.)

"That whatever contract, rights, privileges and franchises said plaintiff company may have had in the above described roads have expired, and the defendant city may require said company to cease its service upon streets * * * and to remove its property therefrom, upon giving the notice in time for removal, as required under the terms of the decree entered in the case of *City of Detroit, vs. Detroit United Railway*, pursuant to the opinion found in 172 Mich., p. 136."

Under the pleadings in this case, the utmost that the District Court could lawfully do was to enter a decree dismissing appellant's bill, either for want of jurisdiction or for lack of equity. When that court went farther and granted to appellee, the City of Detroit the affirmative relief above stated, it transcended its authority, and, however, this Court may decide the other propositions presented by this record, it cannot, we respectfully submit, affirm the decree. In this connection attention is called to the circumstances that appellant assigned error for this improper practice.

See assignments of error 2 and 3. (R. pp. 69-70.)

If the Court approves the foregoing reasoning it should deny appellees motion to dismiss and affirm, and in that case we ask that it grant our motion and appellees motion to advance. If it does not approve said reasoning we ask it to read the following part of our brief.

Appellee's counsel make what they call:

"A BRIEF STATEMENT OF THE FACTS"

This statement is neither fair, accurate nor helpful. As there is involved in this case merely the question of the sufficiency of appellant's bill; the facts averred in that bill and only those facts, should be brought to the attention of the court. Appellee's counsel, instead of stating such facts, have stated the facts shown in affidavits attached to their motion, most of which are irrelevant to any issue here involved. It is true they have made some statements concerning the allegations of the bill, but they have so mingled with these statements taken from the affidavits, that what they say will not aid the court to understand the questions involved. As an illustration of counsels' practice we call attention to the reference to the other suits commenced by appellant and to the particularly reprehensible statement:

"The Detroit United Railway has been very prosperous, paying eight per cent dividends on its watered capital stock . . . besides acquiring, largely out of the Detroit earnings, a vast interurban system, and accruing a large surplus."

Appellees' Brief Page 5.

We respectfully submit that in order to get a clear understanding of the questions involved, this court should

disregard appellee's statement, and look at appellant's statement, in its Motion to Advance, pp. 4 to 7, and at the statements in this brief.

MOTION TO DISMISS BECAUSE NO FEDERAL QUESTION IS INVOLVED.

It is to be noted that in appellee's argument under this heading, no reference whatever is made to the fact that the decree appealed from granted it affirmative relief upon the ground that it had jurisdiction, and that appellee is now seeking an affirmance of that decree. It would seem as if this inconsistency demanded an explanation.

The principal ground upon which appellees contend that the District Court lacked jurisdiction is that there is no relation between our Federal constitutional objection and the proposition of street railway acquisition which we assail. The answer to this complaint is found in the following averments of our Bill.

"Plaintiff further avers that it is the claim of the defendants that the effect of the vote of the electors of the City of Detroit gives them as city officials, full power and authority to compel said plaintiff to sell to the city its trackage on Woodward Avenue and on Fort Street, and on the day-to-day lines heretofore described for \$40,000.00 per mile, which, as heretofore stated, is very much less than its real value and very much less than it would cost the city if it constructed the same; and as to the day-to-day lines, it is very much less than the cost of the said lines to the plaintiff, less depreciation.

"Plaintiff also avers that it is the intention of said defendants to enforce said claim and they have threatened to do so and plaintiff upon information and belief says they intend immediately to take steps to enforce it. * * *

"Plaintiff further avers that after the election and before the votes were canvassed, and apparently upon the assumption that the vote on said proposition as reported by the City Clerk, and hereinbefore set forth, was correct, and therefore before said proposition or said ordinance could become effective, said defendant Cousens by the acquiescence of the other defendants in this bill, caused the work of construction of said street railways to be started, and that it is the intention of said defendant Cousens, acting as mayor of the City of Detroit, and of the other defendants who are subservient to his will and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid, without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same, and thereby deprive plaintiff of its property without due process of law, in contravention of the due process clause of the 14th Amendment of the Constitution of the United States." (R. pp. 20-21.)

For a statement of the illegal methods which the defendants propose to adopt for the enforcement of this claim see the averments of the Bill of Complaint. (R. pp. 16, 17, 19, 20 and 21.) For a discussion of these methods see pp. 19-20 of this Brief.

In answer to other reasoning of appellees' counsel under this heading, we say that these jurisdictional averments in the bill are not to be eliminated therefrom, nor disregarded, because defendants did not lawfully possess and could not lawfully exercise the powers they threatened to exercise. See our Brief on Motion to Advance, pp. 8 to 17 and authorities there cited. See particularly.

Home Telephone Co. vs. Los Angeles, 227 U. S., 288.

Cincinnati vs. Traction Co., 245 U. S., 446.

Cuyahoga Power Co., vs Akron, 240 U. S., 462.

It is equally clear that these averments are not to be eliminated from the bill or disregarded, because counsel concede that defendants did not lawfully possess and could not lawfully exercise the threatened powers.

For further discussion of this subject see page thirteen of this brief.

MOTION TO AFFIRM UPON THE GROUND THAT THE BILL ON ITS FACE DISCLOSES NO EQUITY.

Appellees' counsels' statement under this heading is not fair nor accurate.

They have so stated the case that the real merits of appellant's bill do not appear.

They have not so stated the case as to present fairly, nor have they fairly discussed the following proposition upon which appellant relies.

THE SCHEME OF ACQUISITION OF WHICH THE PROPOSITION VOTED ON IS A PART, INVOLVES IN EFFECT AN ATTEMPT TO DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION.

In our motion to advance this proposition is discussed from two points of view. The first will be found on pages 9 to 11 of that motion. The second will be there found immediately following. Our discussion there of the first point of view we think to be sufficient in opposition to defendant's motion as well. But we deem it proper to present with more detail our reasoning on the second point of view.

Our claim (which appellees' counsel misstate) is in substance:

(a) That since the expiration of the original franchises plaintiff has acquired the right to continue the operation of the tracks covered thereby, not only by ordinances and resolutions of the Common Council expressly recognizing the necessity of continuance, but also by large and continued expenditures necessary for such continuance and made under the direction and permission of the city authorities, and with tacit consent and approval of such expenditures and such continued operation, both by the city authorities and by the people of the city themselves. That in consequence plaintiff has acquired not new franchises for a definite term, but the right to continue these tracks in operation so long as the public interest may require; a right which is not terminable by the arbitrary action of the city.

(b) That the city's scheme of acquisition of a municipal system does violate these rights—contrary to the Fourteenth Amendment.

Our reasoning is as follows:

Tracks upon the streets now occupied by those portions of the Fort Street line and the Woodward Avenue line, the original franchises of which have expired, are essential to the proposed municipal system, and municipal tracks thereon can only be acquired either by taking over the existing tracks of the plaintiff, or by removing those tracks and replacing them with new ones. The city plan, then, necessitates either getting our property by purchase or destroying it by removal.

It appears by explicit averment of the bill that notwithstanding the expiration of these original franchises, the company has, through municipal action recognizing the necessity of continued operation, and granting the right to continue, and through its own expenditures upon these lines since the expiration of the original grants, made by authority of the municipal officials and with their acquiescence and that of the people of the city, acquired the right to continue these tracks until their discontinuance shall be consistent with public interest.

If under these facts the city has lost the right of immediate ouster, which arose at the expiration of the original franchises, and the company has acquired a right to continued operation, that is a valuable property right which the city cannot terminate at its arbitrary will.

It is maintained by the defendants that because under the Michigan constitution, Article VIII, Sec. 25, a municipality cannot grant a public utility franchise not subject to revocation at its will without the affirmative vote of three-fifths of its electors voting thereon, the company has not acquired any right to continue these

tracks, but that their removal may be required now as it might have been at the time of the expiration of the original franchises.

Does this constitutional provision preclude the acquisition, without a popular vote, of a right in the nature of a franchise right, revocable whenever its termination shall be consistent with the public interest?

The question is whether such a right can be created either by grant or by estoppel. It is our position that although under the Michigan constitution a popular vote is necessary to validate the grant of a *term* franchise, a right, in the nature of a franchise, to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created either by consent or grant of the municipal officials, or, in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in, and tacit approval of, action taken under the direction of the municipal officials. In the present case the right to continue rests upon both grounds, grant and estoppel.

The constitutional prohibition against the grant, without popular vote, of any public utility franchise, not subject to revocation "at the will of the city or village," does not mean that rights acquired without a popular vote may be arbitrarily terminated. The public will, which determines the revocation, is not uncontrolled and

absolute. It is to be exercised if and when the public interest requires, and not otherwise.

The Supreme Court of Michigan expressed this distinction in their decision in *Peck vs. Detroit United Railway*, 180 Mich. 343, where they sustained the validity of a franchise grant which by its terms was to be ended "by the Common Council or the people of the City of Detroit at their pleasure or caprice." The Court say that the most that can be claimed for the grant in question "is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed, it is revocable at the will of the city *when-ever the public interest requires its termination.*" (See opinion, p. 347.)

The decision of *Denver vs. Denver Union Water Company*, 246 U. S. 178, necessarily involves the principle for which we contend.

The city ordinance, whose validity was attacked in that case, recited that the Water Company was a mere tenant by sufferance, and declared that it was made to regulate its charges "during the time it shall further act as a water carrier and tenant by sufferance in said streets." The ordinance was presented to the city council by initiated petition of electors, and was passed by the council without reference to popular vote (See opinion, p. 188). The Colorado Constitution contained, Article XX, Section 4, relating to the city and county of Denver, (I Mills Statutes, Colorado, p. c-277), the provision that "*no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors.*"

(The brief for appellees states with reference to this case (see p. 21) that "There was no constitutional prohibition against such action.")

It was contended on behalf of the city that as the company was merely a tenant by sufferance, its property was subject to immediate removal at the arbitrary will of the city, and therefore must, for the purpose of fixing a reasonable return upon its value, be taken at junk value. The court, however, construed the ordinance (p. 190) as "the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver;" and held that the property of the company must therefore be valued as property in use.

In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*

In *Detroit United Railway vs. Detroit*, 248 U. S. 429, this court held an ordinance which purported to regulate the rates of fare on the company's entire city system, including both franchise and non-franchise lines, and which by its terms was to remain in force a year unless amended or repealed, to amount "to a grant to the company for further operation of the system during the life of the ordinance," which necessitated a fair return to the company upon its investment. The decision is based by the court upon the decision in the Denver case, although the provision of our state constitution is not referred to.

These cases definitely hold that under conditions similar to those existing in the case at bar, new rights—indeterminate franchises—were granted to the company by the action of the city, to continue until the interest of the public will warrant revocation. Therefore the most that the city can claim, would be that when legally in a position to provide the service the public needs, the city might terminate the grants.

While we do not assent to this claim, which wholly ignores the company's interest, we submit that the city could not terminate the grants at least until legally qualified to acquire or provide a street railway system. Appellant insists that the city, because of the invalidity of the adoption of the proposition for street railway acquisition is not in a position legally to provide such a system and therefore cannot now terminate these grants. The court therefore must determine whether the proposition so adopted does give valid authority to purchase or construct the system needed, for proceedings to take appellant's property, if that adoption gave no valid authority, would be taking that property without due process of law. It follows therefore that a Federal question is presented under the allegations of the bill that the proceedings under which the city proposes to take appellant's property are invalid. It follows also that the city cannot terminate appellant's rights because not legally in a position to provide a street railway system, and that it is the company's duty to continue service at least until such legal authority is acquired by the city.

In this connection the further question will arise whether under any authority that may be conferred, the city can terminate the company's rights in streets where at the city's instance it has expended millions of dollars to enable it to serve the public needs, until it is pre-

pared to deal equitably with the company by paying the fair value of the property it proposes to take.

If an indeterminate franchise can be created by ordinance, it may equally be created by estoppel. If the Common Council might create a continuing right to operate the Fort and Woodward lines by passing an ordinance, they might do so by recognizing the necessity of continued operation, and directing and permitting the expenditures which made continued operation possible. And the acquiescence of the people shows their approval of the action of the city officials.

The continued operation of these lines after the expiration of their franchises was necessary in the public interest and was so recognized by every one.

Early in 1909, the year when the city claims the Woodward Avenue franchise expired, and the year before the expiration of the Fort Street franchises, the Common Council authorized payment of the expense of investigating the street railway situation undertaken with a view to continuance of service in the future. To a bill filed to enjoin this payment from city funds, the city and its officials made answer as appears by the report of the case, *Attorney General vs. Circuit Judge*, 157 Mich. 615 (see pp. 617-618) saying among other things that certain street railway franchises are to expire in November, 1909, "That these defendants are informed and believe that the character of the population, the manner in which the city has been built, is such that street railway service is essential in order to accommodate the people from day to day. That it is necessary to take steps to continue the street car service. That the City of Detroit as a municipality is powerless to engage in this enterprise itself, and that it is incumbent upon the officers of

the City of Detroit to make an investigation and ascertain, if possible, upon what terms and upon what conditions the city may continue to enjoy street railway facilities."

This was before the city was given the power to acquire a municipal street railway system. The course of action of the city authorities directing and authorizing expenditure by the company to enable the continuance of the service, the necessity for which the city thus solemnly recognized, began immediately in 1909 and was pursued in the years following. It was provided for by the Common Council by ordinance and by resolution. There was needed, in order that operation might continue and the lines give efficient service, large and continued expenditures of money. Those expenditures were made in part under explicit direction, and in all cases with the permission of the municipal officers. The public knew of these things, tacitly approved them, and have enjoyed their benefits for some seven years after the time when by the Fort Street decree, the city's power of ouster was made legally effective.

Defendants assert that notwithstanding these arrangements for continued operation, the company's expenditures upon the strength of them, and public acquiescence and approval, the Fort Street decree is still enforceable, and that the city may compel immediate removal of the line on that part of Woodward Avenue where the franchise expired in 1909.

It is held, however, in an early Michigan case, whose authority has never been questioned (*Ramsdell vs. Maxwell*, 32 Mich. 285) that where, after a decree for possession under a foreclosure sale upon which a writ of assistance might have issued, a new arrangement is made

between the parties under which the mortgagor continues in possession, a writ of assistance cannot thereafter be issued, and the question of the right to continued possession cannot be determined on the application for such a writ, but must be litigated independently.

This is a direct authority that the Fort Street decree is no longer enforceable.

See also

Barlow vs. Beattie, 28 N. J. Equity 412.

Judge Dillon, in discussing this subject says that a municipal corporation

"does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted against the public but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time but upon all the circumstances of the case to hold the public estopped or not as right

and justice may require" (3 Dillon, Municipal Corporations, 5th Ed. Sec. 1194).

City Railway Company vs. Citizens Street Railway Company, 166 U. S. 557.

This case was an appeal by the Citizens Street Railway Company to enjoin the defendant from disturbing it in the construction, operation and maintenance of its street car system. The right to injunction depended upon the validity of an ordinance extending the plaintiff's original franchise for seven years. It was attacked mainly on the ground of want of consideration for the extension. After the passage of the extending ordinance, the company had floated a refunding loan upon the strength of the extension. The court say (p. 566):

"While this transaction cannot properly be termed a legal consideration for the ordinance since the negotiation of the new loan was neither a benefit to the city nor a detriment to the Railway Company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders who have in good faith invested their money in reliance upon the validity of such action demands that the city shall be held to its contract notwithstanding there may have been originally no consideration to support it."

Essex vs. New England Telegraph Company,
239 U. S. 313.

In this case the town of Essex was enjoined from interfering with the operation of lines owned by the appellee company, which was plaintiff below. It appeared that while the company had in 1884 made application pursuant to the Massachusetts statute to the Essex Selectmen for a right-of-way for their lines, that application was never granted, but shortly thereafter the lines in question were constructed and for some twenty years were maintained at large expense along the town highways, and that during many years no objection was made to their operation. After stating that had the records of the Selectmen shown that in response to the company's application they had given a writing specifying the location of the lines and character of the construction and they had been constructed accordingly, such lines would be protected against exclusion or other arbitrary action by the town, the opinion continues (p. 32!):

"With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (citing cases) and like reasons may demand similar protection to the possession of a telegraph

company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. (Citing cases, including the City Railway case above referred to and the section we have quoted in Dillon, Municipal Corporations.)"

In each of the two cases last cited, the municipality had power by a prescribed method to grant a franchise right, but that method was not pursued. It was held nevertheless to have been estopped by its acquiescence in the exercise of the right which might have been granted.

In the case at bar there was municipal power to grant the right which we claim. Admitting for the purpose of the argument that a popular vote would be necessary to the validity of such a grant, the people may estop themselves by their acquiescence in the exercise of the right in like manner as the municipal officials would estop themselves by a similar acquiescence had the right to make the grant lain in them.

If the company has, under these circumstances, a property right in the portions of the Fort and Woodward lines where the original franchises have expired, not terminable at the arbitrary will of the city, does the scheme of acquisition of the proposed municipal system violate that right?

To carry out its plan, the city must either obtain this trackage by purchase or remove it and put in new tracks of its own. The scheme is either to compel a purchase at an inadequate price by threatening illegal removal, or actually to compel removal by illegal means, and to carry out this plan at once without affording any opportunity to test its validity by legal proceedings.

That the execution of such a scheme would deprive plaintiff of its property without due process of law does not require argument. The cases are numerous and uniform.

Cuyahoga Power Co. vs. Akron, 240 U. S. 482;
Cincinnati vs. Traction Co., 245 U. S. 446;
 are directly in point.

They have not so stated the case as to present fairly, nor have they fairly discussed the following important question:

WAS THE PROPOSITION TO ACQUIRE THE STREET RAILWAY SYSTEM SO SUBMITTED TO THE VOTERS THAT THEIR AFFIRMATIVE VOTE THEREON AUTHORIZED SUCH ACQUISITION?

The ordinance provided for the acquisition of a street railway system on two classes of streets: on those where there were, and those where there were not existing street railways. The ordinance, in explicit terms, provided for the acquisition of the entire system by construction. It contained these words (R. p. 33):

"and said Board of Street Railway Commissioners shall construct, own, maintain and operate for said City of Detroit . . . a system of street railways upon the surface of the streets, avenues and public places herein designated."

This ordinance was ineffectual, unless the proposition of acquisition, which it contained, was approved by the electors of the city under the following provision of the State constitution:

"nor shall any city or village acquire any public utility . . . unless such proposition shall first receive the affirmative vote of three-fifths of

the electors of such city or village voting thereon at a regular or special municipal election."

(*Constitution of Michigan*, Article VIII, Sec. 25).

The common council of the city, who framed the ordinance also had the duty of framing and did frame the proposition to be submitted to the electors, but in doing so they omitted the language of the ordinance above quoted, limiting the method of acquisition of the entire system to construction, and used the following ambiguous language (R. pp. 34, 40):

"Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system * * * as hereinafter designated (following with the description of the different lines) * * * so as to make a complete street railway system; and to make the necessary purchases of lands * * * and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated, and to purchase or construct such * * * buildings as may be required to maintain and operate said street railway system."

So that it is not true, as stated in appellee's brief, page 23,

"A reading of the ballot, whose language was prescribed fully in Section 2 of the Ordinance (R. p. 34) shows that the proposition was fully described in precise elaboration, and that nobody could misunderstand it."

What is true is this, that by omitting the words requiring construction, the proposition of acquisition sub-

mitted to the voters was ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction, although, it is undisputed that because of specific requirements of the city charter set forth on page 18 of the record, it does not authorize purchase. Taking advantage of this ambiguity in the statement, and having in mind the fact that a large proportion of voters desired to purchase existing lines, and to use the power of construction only where there were no existing lines, the city officials who were charged with the duty of submitting the proposition, issued and distributed among the voters before the election explanatory statements which they styled "official information" as to the proposed street railway plan, which statements assured the voters that all existing lines upon streets included in the proposed municipal system would be acquired by purchase. This assurance to the public was especially effective because in that way the people would avoid the impairment and disruption of service necessarily consequent if these lines were torn up and new lines constructed by the city in their place. Appellee's brief ignores the foregoing important circumstance that these explanatory statements to the voters were made by the officials who were charged with the duty of submitting the proposition to the voters, and were issued by them in their official capacity. Appellee's statement would give the impression that the only representations made to the voters were the ordinary campaign speeches and campaign literature made or issued by individuals of the community who favored or opposed this proposition; and notwithstanding that the only question before the court is the sufficiency of plaintiff's bill, they venture to refer to the affidavit of Mr. Couzens as proof that "the proposition and ordinance were debated from every angle" (See their brief, p. 24).

The question then is whether the proposition to acquire was so submitted to the voters that their affirmative vote upon it authorized the acquisition. We have shown that the proposition as submitted was ambiguous in form, and that its effect was misrepresented to the voters by the officials who submitted it. If this official assurance that these lines were to be purchased had been given in the proposition as printed on the ballot, no one would contend that there was a legal submission of a proposition for constructing these lines. But the assurance given by the common council by publication and distribution to the electors in the manner it was given, was even more effective than had it been printed upon the ballot. It was distributed at their homes long enough before the election to give them an opportunity for examination and conclusion as to what the proposition was.

This court would refuse to see a manifest truth if it failed to recognize the potency of such assurances. If the court is to disregard these assurances as the trial judge did, because they were not contained in the proposition submitted, then a legal way is opened to the officials submitting the proposition to nullify the constitutional provision requiring submission. Is it not true in law, as it is in fact, that the official explanations of the proposition were part of the proposition itself? While it is true that the making of this official explanation was not required by law, neither was it forbidden; and we respectfully submit that it was within the province of those charged with the duty of submission to make an explanatory statement of the proposition to the voters for the purpose of enabling them to correctly understand it.

Surely officials charged with the duty of submitting this proposition cannot so submit it as to obtain an affirmative vote by official false pretenses.

Those charged with the duty of submitting this proposition to the electors should so submit it that the electors will understand it. Indeed, that is the necessary implication of the Michigan constitutional provision heretofore quoted, requiring submission.

Dillon, regarding the submission of propositions to popular vote, says:

"Even where there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted in such manner as to enable the voters intelligently to express their opinion upon it."

(2 Dillon, *Municipal Corporations*, 4 Ed. Sec. 891);

Boseman vs. Sweet, 246 Fed. (C. C. A. 9th Cir.) 370.

Here a bond issue was submitted under a statute providing that a 3 per cent debt limit should not be exceeded except upon popular vote. The form of submission stated the question to be as to the issue of bonds, in a specified sum, without stating that such an issue would exceed the debt limit. The submission was held bad because the voters were entitled to be informed that the issue would increase the limit.

Beers vs. Watertown (S. Dak.) 177 N. W. Rep. 502.

In this case the issue of certain bonds purporting to be authorized by a popular vote was enjoined. By statute the common council could appropriate money for purchase or erection of a system, or part of a system, to

provide light, heat and power for municipal, industrial and domestic purposes, and submit to the electors the question of issuing bonds to provide the necessary funds. The form of submission was, whether the city should issue bonds in a specified amount to construct or purchase a system to provide light, heat and power for municipal, industrial and domestic purposes. It carried. The bill (which was demurred to) averred that the electors voted in the belief that the amount of bonds authorized was enough to provide a complete system furnishing electricity for industrial and domestic, as well as municipal purposes; that the amount authorized was in fact inadequate for the three purposes, and that the council planned a system to furnish light and power solely for municipal purposes. The reasoning of the court sustaining the issue of an injunction is as follows (p. 505):

"It may be that facts exist which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors. To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes, and when the council intended to provide a system radically different than what the electors were led to expect, would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized."

Appellees cite *Jones vs. McDade* (Alabama) 75 Southern Reporter, 988, as authority for the proposition that the ordinance having been published in extenso, according to law, the conclusive presumption is that the electors ascertained its terms from such published authorized text. In that case the question related to the validity of the submission of a constitutional amendment. It was submitted in accordance with the applicable constitutional provisions, and there was nothing ambiguous on the face of the ballot, nor were any official misrepresentations made concerning its character.

Appellee's counsel assert (citing numerous cases) that the voters in the present instance were quasi legislators, and that courts cannot determine the motives or reasons which induced their vote. These cases cited lay down the familiar rule that courts will not hold legislative action invalid because legislators who enacted it were actuated by improper motives, and therefore will not investigate allegations as to motives. The question here is different, and these authorities are inapplicable. The question here is whether the constitutional provision requiring a proposition to acquire a public utility to be submitted to the electors is complied with where the proposition is so submitted as to lead the electors to vote for it because they believe its meaning to be the precise opposite of its legal meaning. While it may be true that the common council acted in a legislative capacity in adopting the ordinance of acquisition, it is by no means clear that the electors in voting upon the proposition submitted, acted in that capacity; and if they did, it is true, we submit, that they did not act in a legislative capacity in any such sense that the rule under consideration can be invoked to prevent courts granting appropriate relief for the improper submission. Surely the

defendants who made this submission cannot, when called to account, escape responsibility by contending that the court cannot determine the matter because in voting for the proposition the electors were acting as legislators. For, if this be so, the constitutional provision requiring submission can be entirely disregarded by those officials whose power it was intended to limit.

We respectfully submit that for a correct statement of our bill, and as to whether or not it made a case for equitable relief, the court should look at our brief in support of Motion to Advance, pp. 18 to 29, and at this brief.

APPELLANT'S MOTION TO AMEND BILL AND THE COURT'S DENIAL THEREOF

This is a comparatively unimportant matter and we would not refer to it had not appellees' counsel asked the court to disregard the averments in the Bill that appellant had made expenditures and done various acts in pursuance of resolutions of the Common Council upon the ground that appellant:

"positively refused to incorporate a sample of them (said resolutions) in the Record before the court below." (See appellees' Brief, p. 18).

What is true is this. That after the trial court had rendered its oral opinion sustaining appellees' motion to dismiss, appellant moved to amend its Bill of Complaint by incorporating in its body a reference to and to attach as exhibits, copies of the proceedings of the Common Council, showing that city funds were used to pay for

printing and distributing to the voters the official explanation of the street railway proposition hereinbefore described. (Record, pp. 61-64),

The disposition of this motion is shown by the following excerpt from the court's order thereafter made.

"The Court having offered to grant leave to amend said bill as proposed by the plaintiff conditionally, however, upon plaintiff's further amending its said bill as proposed by the defendants by appending thereto as exhibits copies of the resolution of the Common Council of Detroit, described in general language in Section 5 of said bill, and the plaintiff having declined to accept said condition.

Ordered that said motion for leave to amend said bill * * * be and the same hereby is denied" (R. p. 65).

We respectfully submit that it was highly improper for the court to refuse to grant our motion to amend our bill unless we would also amend it upon an altogether different subject, in such a manner as to please the defendants. (We assigned error on this refusal see Assignment of Error 13, R. p. 71).

We likewise submit that the averments in the Bill concerning these resolutions were sufficiently definite to answer all the requirements of pleading. (They are found in the Record, bottom paragraph, p. 7).

AFFIDAVITS ATTACHED TO APPELLEE'S MOTION

No doubt it was proper for appellee to prepare affidavits in reply to that filed in support of appellant's motion for an injunction.

It is clear, however, that the statements in the affidavit of Mayor Couzens have no relation to that motion, and have no other purpose than to make the case appear different from that stated in appellant's Bill of Complaint. The question before the court is whether appellant's Bill states a case. This is to be determined from the averments of the Bill and it cannot be decided on ex parte or conflicting affidavits. **WE RESPECTFULLY SUBMIT THAT THE AFFIDAVIT OF MAYOR COUZENS IS IRRELEVANT, AND UPON THAT GROUND WE MOVE THAT IT BE STRICKEN FROM THE FILES. IF THE COURT DENIES THAT MOTION, IN THAT CASE AND ONLY IN THAT CASE WE ASK IT TO READ AND CONSIDER THE COUNTER AFFIDAVIT OF MR. BURDICK HERETO ATTACHED.**

We respectfully submit that Appellees Motion to dismiss or affirm should be denied and that Appellant's Motion and Appellees' Motion to advance granted.

ELLIOTT G. STEVENSON,
Attorney for Appellant.

JOHN C. DONNELLY,
WILLIAM L. CARPENTER,
P. J. M. HALLY,
H. E. SPALDING,
Of Counsel.

IN THE
Supreme Court of the United States
 OCTOBER TERM 1920.

DETROIT UNITED RAILWAY, <div style="text-align: right;">Appellant,</div> <div style="text-align: center;">vs.</div> CITY OF DETROIT, et al., <div style="text-align: right;">Appellees.</div>	}	No. 492.
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Eastern District of Michigan, ss:

Ellsworth J. Burdick being duly sworn says that he is Assistant General Manager of the above named appellant and makes this affidavit to be used in opposition to appellees' motion to dismiss or affirm, made in the above entitled cause.

Affiant says that he has read the affidavit of James Couzens, Mayor of the City of Detroit in support of said motion; that it is not true as therein stated that the so-called day-to-day agreements were inaugurated after the decision in May, 1913, of Detroit United Railway vs City of Detroit, 229 U. S., 39, but on the contrary, the first of those agreements were made in 1911.

**SUITS COMMENCED BY APPELLANT OR BY OTHERS
WITH APPELLANTS APPROBATION IN
REFERENCE TO THIS MATTER.**

There are six such suits:

1. This suit.

2. *Suit of New York Trust Company vs. City of Detroit, et al.*, in United States District Court for the Eastern District of Michigan in Equity. This suit is in every material respect like suit No. 1, except that the jurisdiction is based on diverse citizenship. It was dismissed on motion of defendants for lack of equity and it is expected that it will be appealed to the United States Circuit Court of Appeals unless an early decision of suit No. 1 makes such an appeal unnecessary.

3. *Ellsworth J. Burdick, (this affiant), vs. City of Detroit*. Quo warranto in Wayne Circuit Court to have the election of April 5th, 1920, set aside upon the ground that the ballots cast by the voters were exposed and void, and should not be counted. Under the laws of Michigan an exposed ballot is void. It is claimed that they were exposed because they were printed on such thin paper that when they were folded the vote of the electors could be seen. It was also claimed that they were so folded that their choice could be seen. It was also, so claimed, that they were actually exposed.

4. *The Detroit United Railway, et al., vs. City of Detroit, et al.* This suit brought in the District Court of the United States for the Eastern District of Michigan sought to restrain the defendants from constructing

tracks on Harper Avenue and from interfering with the appellants construction, maintenance and operation of tracks thereon, principally on the ground that the defendant's action impaired certain franchises of the appellant and one of its subsidiary corporations.

The suit sought also to restrain defendants from using city funds in the purchase of municipal street railway bonds issued on authority of the election of April 5th, 1920, and from issuing and selling any such bonds.

5. *Detroit United Railway vs. City of Detroit, et al.*, in the Wayne Circuit Court in Chancery. This suit commenced May 12th, 1920, sought to restrain the defendants from street railway construction on Charlevoix Avenue and from using any moneys of the City, including moneys taken from the sinking fund, either in paying for such construction or in the purchase of any bonds authorized to be issued for street railway acquirement in the election of April 5th 1920. It did not pray to have that election declared void. The case was heard on an application for an injunction, but no decision has been rendered.

6. *Detroit United Railway vs. City of Detroit, et al.*, in Wayne Circuit Court in Chancery. This suit commenced August 11th, 1920, sought to enjoin the purchase by the city of any street railway construction bonds issued under authority of the election of April 5th, 1920, and to enjoin the use of any city moneys in payment for such bonds, or in payment upon certain street railway construction contracts made after the contract involved in suit (5), and that certain sales of such bonds to the City Treasurer and the City Sinking Fund Commissioners be declared void. The bill does not pray to have the election of April 5th declared void. This matter was heard

on a motion for an injunction which was denied, and is now pending in the Supreme Court of Michigan. That court having issued an order to show cause why a mandamus should not be granted to compel the issuance of such injunction.

The ground upon which in said cases No. 5 and 6 the annulment of the purchase of said bonds from city's moneys was asked was

That the City Charter required that municipal street railway construction should be financed entirely by the sale of public utility bonds for the retirement of which a sinking fund created out of the earnings of such municipal street railway system was provided and that the use of tax money for such construction was forbidden. The applicable provisions of the City Charter being as follows:

"The Common Council shall sell all or any part of said bonds (public utility bonds) at any time and from time to time upon the request of the Board (Board of Street Railway Commissioners) and pay the proceeds to the city treasurer, and said proceeds shall be used for the purpose of securing in some one of the ways here provided a public street railway system in the city * * *"
(Charter, Sec. 9, p. 67).

After providing for other bonds, known as Street Railway Bonds and which are a lien upon the municipal street railway system only, the Charter continues:

"The Common Council shall issue and sell enough of said street railway bonds to complete the payment of the purchase price or the award in condemnation proceedings or the cost of construction, and whenever any extension to said

street railway system is authorized * * * the Common Council shall issue and sell a further and additional amount of said street railway bonds sufficient to pay the actual cost of the extension and no more. It shall pay and deliver into the city treasury the proceeds of said additional issue of street railway bonds and out of said proceeds the board shall pay the cost and expenses of said extension" (Charter, Sec. 12, p. 68).

The Charter further provides that the rate of fare on said street railway system shall be sufficient to pay and there shall be paid therefrom operating and maintenance expenses, taxes and fixed charges, and

"A sufficient per cent per annum to provide a sinking fund to pay the principal of the mortgaged bonds issued at their maturity, and such other additional per cent per annum to provide in the sound discretion of the Board, a sinking fund to pay the principal of the general bonds issued as soon as practicable, to the end that the entire cost of said street railway system shall be paid eventually out of the earnings thereof." (Charter, Sec. 14, pp. 68-9),

That the purchases of bonds attacked in these suits were made in part from general funds of the city, raised by taxation and appropriated to specific municipal purposes, and in part from the general city sinking fund (which fund is derived mainly from taxation), and of which the only lawful use, (except temporary investment in securities other than those of the city) is purchase or payment of outstanding city indebtedness, not of unissued city bonds which are not part of the outstanding city debt.

The applicable provision of the charter relative to sinking fund is as follows:

"Such Board (Board of Sinking Fund Commissioners) shall from time to time upon the best terms it can make, purchase or pay the outstanding debt of the city, or such part thereof as it may be able to purchase or pay until the same be fully purchased or paid * *. Whenever the Board cannot arrange for the purchasing or paying such debt or any part thereof, it shall temporarily and until it can so arrange, invest the moneys belonging to said sinking fund in such securities bearing interest as it seems safe and advisable." (City Charter, Sec. 11, p. 134).

In short, the attack upon the bond purchases in these suits rests on the proposition that municipal street railways cannot be built from taxes by the device of having city officials buy with tax money the bonds issued to finance such construction, instead of directly appropriating tax money to construction, and that the general city sinking fund cannot be used to create instead of to retire city debt.

As to the alleged re-sale of most of the bonds so purchased on behalf of the city to the public, it is enough to say that as these bonds were unlawfully issued, but are probably enforceable by those who innocently purchased them upon the re-sale, the proceeds of such re-sale cannot reimburse the city funds out of which the city bonds were unlawfully issued in the first instance, but should be held as a fund for the payment of the re-sold bonds.

Affiant says that suit No. 7 described in Mr. Cousens affidavit commenced by residents of Clairmount Avenue, and suit No. 8 therein described commenced by residents

of Eliot Avenue, were not instigated by appellant and appellant has, and has had, nothing whatsoever to do with the same. It is true that Mr. Bernard F. Weadock, described in Mr. Couzens affidavit as attorney for the plaintiff in suit No. 7 was formerly the General Attorney of appellant, but he is not now and has not for a considerable time, been in any way connected with appellant. It is also true that Messrs. Donnelly, Hally, Lyster and Munro, stated in Mr. Couzens affidavit to be attorneys for plaintiffs in suit No. 8, are counsel for appellant, but it is also true that said firm have many other clients and carry on a general law business in the City of Detroit, and doubtless among those other clients are the plaintiff in suit No. 8.

Affiant denies that either of said six suits is trivial or vexatious in character. He avers that each of said suits was brought in pursuance of the advice of appellants' counsel in the belief that the same was well founded, and that it was necessary that the same be commenced and prosecuted to protect its rights.

Suits Nos. 5 and 6 are similar in character and were heard together upon the application for injunction, but for some reason which affiant does not know and cannot state, no decision was made of the motion for injunction in case No. 5.

Affiant further says it is not true, as stated in the affidavit of Mr. Couzens, that appellant, "publicly stated they would harass and embarrass the public authorities," with a series of vexatious lawsuits if municipal ownership and operation was attempted. But it is true that in the course of the campaign preceding the election of April 5th, 1920, representatives of appellant did claim that the proposition of municipal ownership championed by Mayor

Couzens was illegal and that suits would be instituted to prevent its consummation in the event of its receiving a favorable vote.

Affiant further says that it is not true that appellant has for many years last past paid quarterly dividends of 2% (8% per annum.) The truth is that it has paid dividends of that amount for not exceeding four years last past; prior to that it paid 7% per annum, prior to that 6%, prior to that 5% and from September 1st, 1907, to December 1, 1910, it paid no dividend whatsoever. Since it commenced paying dividends March 1st, 1901, to the present time (its last dividend was paid September 1st, 1920), its average dividends paid have been less than 5% per annum, approximately 4¾%.

Owing to the fact that the amount of the capital stock of appellants corporation totaling Fifteen Million Dollars is much less than the total net value of appellants property, a dividend of 8% is less than 4% on the actual value of the stockholders interest in the property.

Affiant further says that it is not true as stated in Mr. Couzens affidavit that the profits from appellants lines in the City of Detroit have been sufficient to practically construct and acquire an interurban system of great value. What is true is that appellants city earnings have been barely sufficient and most of the time utterly inadequate, to pay operating expenses and a reasonable return upon capital invested, and that not one dollar of appellants earnings from its city lines have been used for the construction or acquisition of its interurban system.

The statement in Mr. Couzens affidavit that appellant caused to be published the legal opinion therein set forth declared by Henry C. Walters and others, is

erroneous. Affiant says that he believes such opinion was given and published but appellant had nothing whatsoever to do with either procuring or publishing the same.

It is true, as indicated in Mr. Couzens affidavit, that in the municipal ownership campaign preceding the election of April 5th, 1920, it was publicly contended by those opposed to the project that the proposal to acquire street railway lines by purchase was illegal; but those who made this claim did not succeed in convincing any large percentage of the voters of its truth, largely because Mayor Couzens and his official associates branded it as false and whenever they deemed that course expedient issued and extensively circulated what purported to be official documents assuring, or tending to convince the electors, that their favorable vote for the municipal street railway proposition insured the acquisition by the city of appellants Woodward Avenue and other lines.

Exhibit 1 hereto attached and made a part hereof is one of these documents. This particular document was issued and extensively circulated among the electors of the city interested in the subject matter thereof only a few days before the election of April 5, 1920.

In explanation of this exhibit, it should be stated that the Hamilton cars therein referred to are cars on one of appellants lines built under a day-to-day agreement made in 1911. The Woodward Avenue line therein referred to is a line owned and operated by the appellant under a franchise which it is claimed expired in November, 1909. For the purpose of making a necessary explanation of the same, affiant calls attention to the statement in the Exhibit reading:

"The Hamilton line north of Webb and Burlingame will be of little value to the D. U. R. They

will undoubtedly turn the balance of lines over to us unless they make a transfer arrangement with the city. The city will have the bulk of the traffic on its end."

The city proposed to take that part of appellants Hamilton line south of Webb and Burlingame Avenues, but did not propose to take that part north of Webb and Burlingame Avenues, such north part being within the separate municipality of Highland Park. Also for the purpose of making a necessary explanation affiant calls attention to that statement in the Exhibit reading:

"With the city operating the Woodward Avenue line below Milwaukee, the D. U. R. will be without millions of short haul passengers it now has."

The city proposed to take that part of the appellants Woodward Avenue line running from Milwaukee Avenue south to the river, but not that part north of Milwaukee Avenue.

Affiant further says that there are many other erroneous statements in Mr. Couzens affidavit, which he does not specify because he is advised and believes that by so doing he would do nothing which would be of aid to the court in determining appellees motion to dismiss or affirm.

Ellsworth J. Burdick.

Subscribed and sworn to before me this 4th day of November, 1920.

(Seal)

Warren E. Talcott,
Notary Public, Wayne County, Michigan.

My commission expires August 13, 1921.

EXHIBIT 1**D. U. R. MIS-STATEMENTS**

**Because They Fear the City's Car Plan and Know It
Will Succeed.**

To the Citizens of Detroit:

There are several statements being made by the D. U. R. which should be corrected.

Mis-Statement No. 1. That the riders on the Hamilton cars north of the Grand Belt will have to transfer to Grand Belt cars to get down town.

Correction: There will be Through Hamilton cars bringing them all the way down town via Woodward Avenue.

In addition there will be a certain number of Hamilton cars which will carry people across the city to the east side instead of making them transfer.

The city's plan provides for cars being transferred to other lines instead of the people.

Mis-Statement No. 2. That Hamilton line riders north of Webb and Burlingame will have to pay an extra fare.

The Hamilton line north of Webb and Burlingame will be of little value to the D. U. R. They will undoubtedly turn the balance of lines over to us unless they make a transfer arrangement with the city. The City will have the bulk of the traffice on its end.

If the Company does not reciprocate through its good sense, their freight and interurban business can be hampered in its entry to the city, forcing them to make the arrangement.

Mis-Statement No. 3. Passengers north of Milwaukee on Woodward Avenue will have to pay a double fare.

With the city operating the Woodward Avenue line below Milwaukee, the D. U. R. will be without millions of short haul passengers, it now has.

If they do not immediately see the wisdom of linking up their end of Woodward Avenue line with ours, the city's plan provides for a line of its own out John R Street, the cars crossing over from Woodward at Milwaukee.

Study of the City's plan will reveal that here is an instrument which will make the D. U. R. come to time at last.

It is ridiculous for the Company to say that it will not make a transfer arrangement with the City. It has to if it wishes to keep out of bankruptcy.

If 60 per cent of the people vote "Yes" on April 5 there will be no more trouble with the D. U. R.

Yours truly,

James Couzens,
Mayor.

(The signature on the original exhibit is a fac-simile.)

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**IN THE
SUPREME COURT OF THE UNITED STATES**

DETROIT UNITED RAILWAY,	}	
Plaintiff and Appellant,		
vs.		
CITY OF DETROIT, et al.,		
Defendants and Appellees.		

BRIEF FOR APPELLANT.

Statement of the Case.

Appellant commenced this suit in the District Court of the United States for the Eastern District of Michigan for the purpose of preventing the City of Detroit and the other defendants, who are officials of the city, from taking any steps to acquire a municipal street railway system by the issue of city bonds under the proposition for acquisition of such a system, which received the affirmative vote of the electors of the city at an election held April 5, 1920. The grounds of relief are that this proposition was not so framed and submitted that its adoption by the electors empowered the city to acquire the system. And that the scheme of which this proposition is a part, is an attempt to deprive plaintiff of its property without due process of law.

The jurisdiction of the Federal Court is invoked upon the ground that the execution of the scheme of which this acquisition proposition was a part would deprive the

plaintiff of its property without due process of law, in contravention of the 14th Amendment to the Constitution of the United States.

The defendants appeared and moved to dismiss the bill of complaint upon the ground that the Federal Court did not have jurisdiction, and that the bill made no case for equitable relief.

This motion was duly heard and the Court entered a decree drafted by defendant's counsel holding that it had jurisdiction, and dismissing the bill for lack of equity, but (as pointed out in our brief opposing appellee's motion to dismiss or affirm, p. 3) granting defendant city affirmative relief.

From this decree plaintiff appeals to this court.

The case stated in the bill of complaint is in substance this:

On February 27, 1920, the Common Council of the defendant City adopted an ordinance for the acquisition by the city of a street railway system as therein described, and to submit to the city electors a proposition authorizing such acquisition, and the issue of Fifteen Million Dollars of city bonds to provide therefor. (See Section 3 of the bill, and Exhibit 3 attached thereto, R. pp. 3, 27.)

The ordinance is in five sections, Section 1 reading as follows:

"That the Common Council of the City of Detroit hereby declare * * * it necessary that the Board of Street Railway Commissioners proceed, and the said Board of Street Railway Commissioners is hereby authorized and directed to proceed as soon as practicable to acquire, own, maintain, and operate, for and in behalf of the said City of Detroit, a street railway system upon the

surface of the streets, avenues, and public places * * * as herein designated, to-wit:” (then follows a detailed description of the proposed lines in three classes, A, B and C, and aggregating some 211 miles of trackage) “together with all necessary and convenient turn-outs, turn-tables, curves, sidetracks, switches, connections, poles wires, and overhead power equipment in and along the streets avenues and public places herein designated so as to make a complete street railway system; and to make the necessary purchases of land, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said Board of Street Railway Commissioners shall construct, own, maintain and operate in said City of Detroit for said City of Detroit * * * a system of street railways upon the surface of the streets, avenues and public places herein designated, and further said Board of Street Railway Commissioners are hereby authorized for and in behalf of the City of Detroit to purchase or construct such carhouses, powerhouses, shops, stations, and other buildings as may be required to maintain and operate said street railway system.”

Section 2 provides:

“This body, being the legislative body of the City of Detroit, hereby propose that the following proposition be submitted to the qualified electors of the City of Detroit * * * which proposition shall be printed on the ballots in words and figures as follows:

“Shall the City of Detroit be authorized and empowered to acquire, own, maintain and oper-

ate a street railway system upon the surface of the street, avenues and public places of the City of Detroit * * * as hereinafter designated, to-wit: (Then follows the same description of lines classified as A, B and C lines as is contained in Section 1 of the Ordinance.) "Together with all necessary and convenient turn-outs, turntables, curves, side tracks, switches, connections, poles, wires and overhead power equipment in and along the streets, avenues and public places herein designated so as to make a complete street railway system, and to make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated and to purchase or construct such car houses, power houses, shops, stations and such other buildings as may be required to maintain and operate said street railway system and to borrow money on the credit of the City of Detroit by the issuance of the public utility bonds of the City of Detroit up to an amount not to exceed Fifteen Million (\$15,000,000.00) Dollars for the purpose of so acquiring and owning said street railway system?

Yes ☐

No ☐ "

Section 3 of the ordinance provides for calling a special election for the vote on this proposition.

Sections 4 and 5 provide that if any clause in the ordinance is held invalid, it shall not affect the validity of the remainder, and that the ordinance shall take effect 30 days after approval by the Mayor.

Plaintiff is a taxpayer in the City of Detroit, paying taxes on property having an assessed value of upwards of twenty-five millions of dollars, and taxable on account of the city bonds proposed to be issued under the proposition set forth in the ordinance, to an amount in excess of three thousand dollars. It owns and operates the street railway system in the City comprising approximately 290 miles of track, and also interurban lines connecting therewith of approximately 565 miles. (Bill, Sections 2 and 5, R. pp. 3, 8).

The plaintiff's city system includes certain lines known as the Fort Street Lines with a single track mileage of approximately 30 miles, the Woodward Avenue line, with a mileage of approximately 19 miles, and certain lines constructed under what are commonly known as the "day to day agreements" between the plaintiff and the city, with a mileage of about 50 miles (R. pp. 2, 4).

Of these lines, the part of the Fort Street lines east of Artillery Avenue, with a mileage of 16 miles with a present value of approximately \$1,400,000, part of the Woodward Avenue line south of Milwaukee Avenue, with a mileage of nearly 7 miles, and a present value of \$614,000, and of the lines constructed under day to day agreements, nearly 30 miles, with a present value of approximately \$3,750,000, are upon streets comprised in the city system as described in the ordinance and proposition above stated. (Ordinance and proposition, Class "A" lines, paragraphs 11-12, 13-21; R. pp. 29-31.)

About 330,000,000 of revenue passengers are carried annually on plaintiff's city system, and of these approxi-

mately 23,000,000 passengers are carried over the Fort Street lines east of Artillery Avenue, and approximately 55,000,000 are carried over the part of the Woodward Avenue line south of Milwaukee Avenue (bill of complaint, R. p. 9).

Those portions of these lines above described which are situated on streets comprised in the proposed city system are, owing to the relative locations of the industrial, commercial and residential districts of the city, essential parts of those lines, and of the plaintiff's city system, and are essential to the proper service by that system of the transportation needs of the public (bill, R. p. 4). These portions of the lines on the streets comprised in the proposed city system, and particularly the Fort Street lines east of Artillery Avenue, the Woodward Avenue line south of Milwaukee (ordinance and proposition Class A lines, paragraphs 11 and 12, R. pp. 29, 30) which would constitute the only means of access afforded by the proposed city system to the main business center of the city (bill of complaint, Section 7, R. p. 9) are likewise essential to that system, and without these lines the remaining lines proposed to be acquired by the city would be of little use.

The acquisition by the city of the lines which it proposes upon the streets described in paragraphs 11 and 12 of its proposition must be either by purchasing the present tracks of plaintiff upon these streets, or by removing them and replacing them with new tracks, what they really propose being a threatened exercise of the power of ordering removal to compel appellant to sell this trackage at an inadequate price. (Bill of Complaint, Secs. 11-13, pp. 10, 11, 14-17.)

Plaintiff's franchises for a portion of its Fort Street lines east of Artillery Avenue were, in February, 1913,

in the so-called Fort Street case, held by the Supreme Court of Michigan to have expired, and their decree provided that the company should, when directed by resolution of the Common Council of Detroit, cease operation of these lines, and remove the tracks from the streets. This decision was affirmed by the Supreme Court of the United States in *Detroit vs. Detroit United Railway*, 229 U. S. 39. The City, however, has never attempted to obtain enforcement of this Fort Street decree; and although it claims that the franchise to the part of the Woodward Avenue line south of Milwaukee Avenue expired in 1909, has permitted the operation of both these lines to continue, and has recognized that their continued operation is necessary in the public interest (bill, Sec. 4, R. p. 5).

Among these acts of recognition are:

(a) The so-called Kronk ordinance (considered by this Court in *Detroit United Railway vs. Detroit*, 248 U. S. 429) which this Court said, in that case, provided "for the continued operation of the company's system with fares and transfers for continuous trips over lines composing the system, whether the same had a franchise or not"; and "amounted to a grant to the company for further operation of the system during the life of the ordinance." (Exhibit 4-b, R. p. 47).

Also:

(b) A suit commenced by the City against the Company in the state court in June, 1919, to compel the operation of certain lines of the system, as essential in the public interest, the operation of the system having been suspended by a strike. In this case it was decreed that the company should operate not merely the lines

specified in the City's bill of complaint but its entire system, for a number of months therein specified, and at a rate of fare fixed in the decree, with a provision for the determination of the rate of fare thereafter by arbitration. The city council passed a resolution approving the arrangement embodied in this decree. (Exhibit 4-c, 4-d, 4-e, R. pp. 48-50).

Plaintiff has expended since expiration of the franchises for its Fort Street Lines, east of Artillery Avenue covered by the decree in the Fort Street case, in the reconstruction of the Fort Street lines, and additions and betterments thereto, in order to give proper service, nearly a million and a half dollars, nearly nine hundred thousand dollars of which was expended on the part of those lines east of Artillery Avenue.

The most of these expenditures were made after the entry of the Fort Street decree. The Company also spent in the reconstruction of and additions and betterments to, that part of the Woodward Avenue line, south of Milwaukee Avenue, in order to give proper service thereon, from the year 1909 (when the city claims the franchise therefor expired) down to 1919 about \$230,000.00. These expenditures both upon the Fort and Woodward lines were made with the knowledge and acquiescence, and either tacit or express approval of the City of Detroit and its officials. The City Charter requires the issue of a permit for doing in the streets of the city such work as that involved in these expenditures, and all of the work was done under written permit and under the supervision of city inspectors, for whose services the city rendered bills to the company which the company paid. In a number of cases the work was done under direction given by a resolution of the com-

mon council of the city. During the period between the expiration of the franchises and 1919 numerous other resolutions were passed by the council directing changes in service and improvements in service over the parts of the Fort Street and Woodward Avenue lines covered by these franchises which involved considerable expense to the plaintiff company and with which it complied. (Bill, Sec. 5, R. pp. 6-8.)

Included in the plaintiff's city system there are approximately 92 miles of track (including said portions of the Fort Street and Woodward Avenue lines), franchises for which the City claims have expired. Upon them the company has spent in all, and including the expenditures above detailed, approximately \$2,800,000.00 since 1909, in order to continue their operation, and that the system might give efficient service, and with the knowledge and acquiescence and approval of the City and its officials under the permits obtained from the city, and in compliance with resolutions of the city council. (Bill of complaint, Section 5, R. p. 8.)

By reason of these acts of recognition of the necessity of these lines whose original franchises have expired, and of their continued operation, and by reason of the expenditures thereon under the direction and by the authority of the city officials, and with the acquiescence and consent of the city and the people of the city, it is claimed that the right of the city to compel the removal of the Fort Street lines east of Artillery Avenue and the right to enforce the removal of that part of the Woodward Avenue line south of Milwaukee Avenue, has ceased, and that the plaintiff has the right and is charged with the duty to continue the maintenance and operation of those lines until such time as the discontinuance of that

maintenance and operation may be consistent with public interest.

Included in the proposed city system (Bill of Complaint, Section 9, Rec. p. 10) are certain lines running in part through the City of Highland Park and the Village of Hamtramck, which city and village are included within the external boundaries of the City of Detroit. These lines are important links in the proposed municipal system and essential to its operation and efficiency. On the streets which these proposed lines cover there is no street railway franchise and under the charter of the City of Highland Park and under the general laws of the State of Michigan there is no power to grant such franchises to the City of Detroit and therefore there is no authority under which the right to construct and operate these lines either in Highland Park or in Hamtramck can be obtained.

In the first section of the ordinance for the acquisition of the municipal street railway system, adopted February 27, 1920, there is an express direction that acquisition shall be by construction,—“said Board of Street Railway Commissioners *shall construct, own, maintain and operate,*” etc. (Exhibit 3, R. p. 33.) The proposition for submission to the voters, however, set forth in the second section of the ordinance, omits this explicit direction, its language being, “Shall the city of Detroit be authorized and empowered *to acquire, own, maintain and operate a street railway system* * * * and to make the necessary purchases of land * * * and things necessary to construct, own, maintain and operate a street railway system * * * and to purchase or construct such car houses * * * and such other buildings as may be required to maintain and operate

said street railway system, and to borrow money on the credit of the city • • • to an amount not to exceed Fifteen Million (\$15,000,000) Dollars, for the purpose of so acquiring and owning said street railway system." (Exhibit 3, Record p. 34, 40.)

At this time those who desired municipal ownership of street railways were divided in opinion, many of them desiring acquisition by the city of existing lines where such lines exist, and construction only where there are no existing lines, and many others desiring the construction by the city of a complete system, without acquisition of any existing lines. The proposition voted upon at the April election was framed with a view to this division of public sentiment, and for the purpose of combining, to carry the proposition, the votes, both of those who favored purchase, and of those who favored construction, as methods of municipal acquisition. The corporation counsel who participated in framing the ordinance, in a public statement upon March 27 said that if the construction and purchase features of the plan were separated, the proposition would never pass, as voters favoring construction might object to a purchase plan and those favoring purchase might object to a construction plan. (Bill of Complaint, Section 12, R. pp. 11 and 12). The total vote upon the proposition was 140,378; for the proposition, 89,285; against it, 51,093; the number of votes in excess of the 60 per cent. needed to carry it being 5,059 (Bill of Complaint, R. p. 4).

The city officials authorized to frame this proposition and charged with the duty of submitting it to the voters made certain representations to induce the voters to believe that under the proposition submitted, where the proposed city system comprised lines on streets now occupied by the plaintiff's tracks (Fort Street east of

Artillery, Woodward Avenue south of Milwaukee, and day to day tracks) such trackage would be acquired by purchase under its real value, and that the only lines acquired by construction would be upon streets where there are now no tracks. The representations were as follows:

The Mayor of the city in his message submitting the ordinance of February 27th, 1920, to the Common Council, and recommending its adoption. (Bill R. pp. 12, Exhibit 5, R. p. 51) said:

"The Class A system (that is, the lines under Class A in the ordinance and proposition) provides the taking over of 34.25 miles of lines built under the so-called 'day-to-day' agreement, in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at, say, an estimated cost of \$40,000 per mile."

He states further items of cost of construction of the additional new lines proposed in Classes A and B system and cost of equipment, the aggregate total cost of purchase, construction and equipment being \$15,022,500, and says that:

"As the building of Class C system will necessarily be delayed for some time, we have not included the cost of these lines in our figures, but have included only the cost of constructing and equipping the lines proposed in Classes A and B."

He also says:

"In proposing this \$15,000,000 public utility bond issue, we have been very liberal in our estimates of the probable cost of the completed street railway system which the plans cover."

Furthermore, the Mayor and Common Council caused to be prepared and distributed to the voters some weeks before the election of April 5, 1920, at which this proposition was submitted, a document purporting to be a statement of the street railway plan (designated on its face as "official information") to be voted on at the election, which contained the proposition to be voted on in the form prescribed in the ordinance (in effect a sample ballot) and which contained also other parts of the ordinance, but omitted the part of Section 1 which explicitly directs the Board of Street Railway Commissioners to construct the lines proposed. (Bill of Complaint, R. pp. 12-13. R. p. 53.)

This document contains a statement of the financial plan for the acquisition of the lines, including the following:

"Financial plan for A and B lines.

"Present trackage to be taken over at cost less depreciation as specified at the time the company was given permission by the city to build under a day to day agreement, 34.25 miles estimated at \$40,000 \$1,370,000.00

"Fort and Woodward tracks where franchises expired, 21.25 miles estimated at \$40,000. \$850,000.00."

The document contained a map showing in red the street railway lines comprised in the proposition, each line being numbered, and there was appended to the financial statement a key to these lines which key included the following:

"D. U. R. lines taken over, Nos. 11 to 21 inclusive."

The statement concluded as follows:

"This official information on the new street car plan is issued by the B. of St. R. C. (meaning the Board of Street Railway Commissioners) with approval of common council."

This document or so-called sample ballot with this official information endorsed thereon was received by

over 75 per cent of the voters. Over 10 per cent of them did not receive it.

After the Court had rendered an oral opinion that the making of these representations were unofficial acts, and had no bearing upon the questions involved in the case (R. p. 59), plaintiff made a motion (R. p. 61) to amend its bill so as to show that the document, Exhibit 6, containing the so-called "official information," was in fact prepared and distributed through the official action of the city officials. The motion was denied by the Court (R. p. 65) on the refusal of the plaintiff to make certain further amendments to its bill relating to an entirely different subject, proposed by the defendants.

The bill charges that these representations (which were contrary to the true meaning and effect of the ordinance) were adapted to and intended to and, in fact, did induce the voters of the city to believe that under the proposition submitted the city would be empowered to purchase the company's Fort Street lines east of Artillery Avenue, and Woodward Avenue line south of Milwaukee Avenue, and would be able to force the company to sell these lines to the city at much less than their value by threatening that if the sale were not made the company would be compelled to remove these lines and thereby suffer the loss of their value and a great impairment of the value of its other lines and property.

The bill charges also that the city designs to give no opportunity to test the validity of its plan by legal proceedings before its execution, but proposes under the claim that the franchises of the Fort Street lines east of Artillery Avenue and Woodward Avenue line south of Milwaukee Avenue have expired and by threatening

to require the removal of these tracks, to force the company to sell them to the city at much less than their value. That this ordinance and proposition were framed in furtherance of that design, and that if the company will not sell its property to the city for the inadequate price offered, the city and its associated defendants will order the removal of these tracks and their equipment from the streets and proceed in the enforcement of that order so far as may be necessary to force a sale by the illegal use of the police and other authority vested in officials who were appointed by the Mayor and are removable at his will and subservient to his dictation. (See Bill of Complaint, R. pp. 14-17, 19-21.)

The substance of the case thus stated and its legal effect may be condensed in the following propositions:

1. The proposition adopted by the voters is for the acquisition of a municipal street railway system upon streets among which are certain streets occupied by tracks belonging to the plaintiff's street railway system, and which are essential thereto.

2. The acquisition of tracks upon the streets so occupied is also essential to the proposed municipal system, because without them that system cannot give the service which the public needs require, and which it is designed to supply.

3. Tracks upon those streets can only be acquired by the city in one of two ways: By purchasing the existing tracks of the plaintiff or by removing and replacing them with new tracks.

4. Though the original franchises for the tracks existing upon the most important of these streets have expired, the plaintiff has, through acts of the city recognizing the necessity for the continuance of their operation,

and through expenditures and improvements since the expiration of these original franchises made by the direction and under the authority of the proper city officials, and with the acquiescence and consent of the city authorities and the people of the city, acquired the right to continue the maintenance and operation of those tracks until such time as it shall be consistent with the public interest to discontinue it.

5. The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

(a) Because the proposition was to acquire a street railway system by construction, not only on streets where there were not existing lines, but also on streets where lines did exist and it was not so submitted to the voters.

(b) Because the proposition was so submitted as to get the affirmative vote of a large number of electors who voted therefor, believing that the scheme of street railway acquisition was to purchase the existing trackage of appellant on the streets mentioned in the proposition, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(c) Because the proposition was so submitted as to get the affirmative vote both of those favoring and of those opposed to purchasing the existing trackage of appellant on the streets mentioned therein, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(d) Because the proposition submitted to the voters was substantially defective and deceptive in that it authorized fifteen million dollars of bonds only to acquire a complete system, when it was known to the city officials who framed and submitted the proposition at the time of the submission that this amount was grossly inadequate for the purpose, and also in that said system included lines to be constructed in Highland Park and Hamtramck, which are separate municipal corporations and in which no authority for such construction can be lawfully obtained by the City of Detroit.

6. The scheme of acquisition of which the proposition voted on is a part involves in effect an attempt to deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

(a) Because defendants contemplate and design so to proceed in carrying out that proposition that no opportunity will be given before its execution to test its validity by legal proceedings.

(b) Because defendants contemplate and design the enforced acquisition by the city of the company's property at an inadequate price, by a threat of an illegal removal and destruction of that property, and by proceeding with such removal so far as may be necessary to accomplish that end.

(c) Because defendants contemplate and design putting an end to plaintiff's right of operating cars on its non-franchise lines while public interest requires such operation to continue.

(d) Because plaintiff has a right to continue to operate its non-franchise lines until the city is itself legally em-

powered to furnish transportation, and defendants design to stop said operation before the city is so empowered.

The subject matter of this suit is therefore within the jurisdiction of the Federal courts.

7. The court having jurisdiction because a Federal question is presented, the plaintiff is entitled to relief because of the illegality in the submission of the proposition to the voters, as well as because of the violation of rights under the 14th Amendment.

As the bill sets up a claim of threatened illegal action under color of state authority, to deprive the street railroad company of its property rights, a Federal question is presented, and this court thereby acquires jurisdiction to determine the validity of the municipal street railway proposition, and of the bonds, which, if issued, will be a charge upon the plaintiff as a city taxpayer in excess of \$3,000.00; as well as to determine whether the action proposed to be taken by the city to carry that proposition into effect is, in fact, an attempt to deprive plaintiff of its property without due process of law in violation of the 14th Amendment.

The two questions to be considered then are:

I. Whether a Federal question is presented.

If such a question is presented.

II. Whether a case for equitable relief is stated; that is, whether there are any substantial grounds alleged either for the attack made upon the validity of the proposition for acquiring a municipal street railway system, or for the claim that the plan for acquiring such system involves a violation of plaintiff's property rights.

The errors relied upon which involve the questions above stated, and which will not be discussed separately, are as follows:

The Court erred:

1. In granting defendants' motion to dismiss and entering a decree dismissing the bill as presenting no cause for equitable relief.

Assignment of Error 1; R. p. 69.

2. In holding that the acts of the city officials in misrepresenting to the voters the proposition for acquirement of a municipal street railway system did not affect the validity of the adoption of the proposition by the voters.

Assignments 4, 10 and 11. R. pp. 70-71.

3. In refusing to allow an amendment of the bill of complainant, without condition, so as to show the official proceedings of the city officials relative to the preparation and distribution of the document, Exhibit 6, purporting to be a statement of the street railway plan to be voted on, with official information of its meaning and effect.

Assignment 13, R. p. 71; proposed amendment R. p. 61.

4. In holding that said proposition was not invalidated by the fact that, the amount of bonds provided for in the proposition being less than the amount necessary to acquire the street railway lines therein provided for, the statement thereof in said proposition would lead the voters to suppose that the amount of bonds was adequate for the acquisition of the lines.

Assignment 12, R. p. 71.

5. In holding that said proposition was validly submitted and that its adoption gave valid authority to construct, maintain and operate the street railway lines therein described.

Assignment 9, R. p. 71.

6. In holding that the plaintiff had acquired no rights in the streets covered by the Fort Street lines and by the Woodward Avenue lines south of Milwaukee Avenue since the expiration of the original franchises thereon; that plaintiff has no contract rights, privileges or franchises in said streets, and that the city may compel it to cease operation upon and remove its property from said streets, other than said part of Woodward Avenue, under the provisions of the decree in the case of *Detroit vs. Detroit United Railway*, reported in 172 Michigan Reports at p. 136.

Assignments 2 and 3, R. p. 69.

7. In holding that the facts alleged in the bill of complaint do not present a case of deprivation of property without due process of law, or a violation of the contract rights of the plaintiff, within the meaning of the 14th amendment to the Constitution of the United States.

Assignments 7 and 8, R. p. 70-71.

I

As to the jurisdictional question, the legal proposition on which its decision depends may be stated thus:

When a bill of complaint shows that either pursuant to an invalid statute, or ordinance, or under color, but in excess of, the powers conferred either by statute, ordinance or other state authority, action is taken or threatened to deprive the complainant of contract or property rights in contravention of the federal constitution, a federal question is presented unless it plainly appears that such averment is not real and substantial, but is without color of merit. Such a question being presented, the United States court has jurisdiction to determine the entire controversy, including all questions, whether federal or not, and irrespective of how the federal question is decided, or whether it is decided at all.

The following cases fully support this proposition:

Siler vs. Railroad Company, 213 U. S., 175. This bill attacked the validity of a Kentucky statute creating a state railroad commission, as a violation of various provisions of the federal constitution, and also averred that an order of the commission making a general schedule of maximum rates for certain railroads was invalid because unauthorized by the statute. The Court say (page 191:)

"The federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the federal constitution, gave the Circuit Court jurisdiction, and having properly

obtained it that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

"This court has the same right and can, if it deem it proper, decide the local questions only and omit to decide the federal questions, or decide them adversely to the party claiming their benefit * * * of course the federal question must not be merely colorable, or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction."

And (pp. 192-3):

"* * * The Bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself on the ground that it violates various named provisions of the Federal Constitution * * * while some of the other Federal questions are founded upon the terms of the order made by the commission under what is claimed by the commission to be the authority of the statute. The bill also sets up several local questions arising from the terms of the order and which the company claims are unauthorized by the statute. The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the Circuit Court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill. * * *

Where a case in this court can be decided without a reference to questions arising under the Federal

Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record."

And the Court contented itself with deciding, and it did decide, that the order in question was not authorized by the state statute.

Home Telephone Co. vs. Los Angeles, 227 U. S., 278.

This bill assailed a city ordinance on the ground that it fixed rates so unreasonably low as to be confiscatory. The federal jurisdiction was challenged on the ground that if this averment were true, the ordinance was repugnant to the state constitution, and that the federal court had not jurisdiction unless the act complained of was in pursuance of authority actually conferred by the state. This contention was overruled. The court say (page 287:)

"The settled construction of the amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed, and deals with such contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the amendment forbids, even, although the consummation of the wrong may not be within the powers possessed, if the commission of the wrong itself is rendered possible

or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."

The same case holds (see page 294 and 5) that acts done under the authority of a municipal ordinance, passed in virtue of power conferred by a state, are embraced by the 14th Amendment.

Cuyahoga Power Company vs. Akron, 240 U. S., 462. This was a bill by a water company, which claimed to have acquired certain property rights in a river, to prevent the appropriation by the city of waters of that river. It averred that the city had no constitutional power to take the plaintiff's property for a water supply, and averred that the city did not intend to institute proceedings against the plaintiff, but intended to take its property and rights without compensation, and that the purpose of the city ordinance and certain statutes referred to is to appropriate the plaintiff's rights without compensation; that the city purports to be acting under the ordinance and in violation of the contract clause and the 14th Amendment of the Constitution of the United States. A decree of the court dismissing the bill was reversed, the court saying that whether the plaintiff had any rights that the city was bound to respect can be decided only by taking jurisdiction of the case, and

the same is true of the other questions raised, and that, therefore, the district court must deal with the merits of the case.

Green vs. Railroad Company, 244 U. S., 499. This case arose on a complaint of certain railroad companies of a discriminatory assessment of their property made by the State Board of Assessors, the claim being that such assessment was an abuse of the authority conferred upon the assessors, and deprived complainants of the equal protection of the laws. This was held to raise a federal question, and the decision reaffirmed the earlier cases holding that the jurisdiction extended to the determination of all questions, including those of state law, irrespective of the disposition made of the federal question. (See p. 508.)

Cincinnati vs. Traction Company, 245 U. S., 446. This case involved the validity of a city ordinance which was alleged to be a repudiation of certain franchise contracts. The ordinance lowered the rates, (the city's claim being that the franchises for certain tracks had expired and on others had never existed) and provided that, should the company refuse or fail to comply with the terms of the ordinance, the city solicitor should take such legal proceedings as may be necessary to enforce the ordinance or to compel removal of the tracks from the streets. The bill averred (p. 452) that the city under the pretended authority of the ordinance threatens to "and will, unless restrained by order of this court; interfere with and prevent the maintenance and operation by plaintiffs of said electric street railway over the routes described in the grants aforesaid and under authority and in accordance with the terms and conditions thereof . . . which will cause great and irreparable injury to these

plaintiffs," and prayed that the ordinance be decreed void and the city enjoined from interfering with the maintenance of the street railway and from attempting to enforce the ordinance. It was the company's claim (see p. 453) that the city "undertakes by the ordinance complained of to require plaintiff, in disregard of its rights under existing contracts, some of which the ordinance assumes may be good, either to abandon its line over the route in question, or to operate on a day to day license and at a reduced fare." The answer of the city (p. 452-3) denied the jurisdiction of the court, denied that under the authority of the ordinance or otherwise it was proposed to interfere with the operation of the street railroad, and stated that the enforcement of the ordinance "is only authorized and will only be sought by and through an order of a court of competent jurisdiction." After a hearing on the merits, plaintiff was given the relief asked. In the brief for the city on appeal and during the argument in its behalf, it was stated that it was contemplated that the rights of the city should be established only through legal proceedings, and that the ordinance could have no effect prior to judicial determination of the parties' rights, and that until this was had no steps could or would be taken to enforce the ordinance. (See page 454.) The Supreme Court held that "the jurisdiction of the court below was properly invoked, and that it had power to adjudicate the issues presented," and affirmed the decree, limiting, however, the injunction so as to restrain the city from taking any steps to enforce the ordinance (except the institution of necessary court proceedings) prior to final adjudication of the controversies involved and making certain other modifications in the decree. (See pages 454 and 5.)

Columbus Railway co. Columbus, 249 U. S., 393. This was a bill filed by a street railroad company to enjoin the enforcement of certain franchise ordinances claiming that these ordinances were not contractual but legislative in their nature; that the company had surrendered them because under existing circumstances the rates of fare therein provided were inadequate and confiscatory, and claiming further that if the ordinances were contractual the company was released therefrom because the war conditions had made the continued performance of the contract impossible, those conditions being such as were not in contemplation of the parties when the contract was made.

On a motion to dismiss the District Court had held that there was no jurisdiction because no federal question was involved, but also considered the case upon the merits, and held that no valid cause of action was stated.

The bill averred (page 405) that the defendants unless enjoined will attempt to force the railway company to continue operation under its franchise, in violation of the 14th Amendment. It appears by the decision in the court below (253 Federal Reporter, 499, see p. 501) that while the bill stated that the defendants threatened to enforce continued operation, it did not state the nature of the threats made and the means to which it is expected the city will resort to enforce its threats. It is also stated in the decision of the District Court (see page 509) that no charge was made that other than legal methods will be adopted by the city to compel the complainant to comply with its contract, and "in the absence of a statement clearly showing a threatened resort to illegal means, a court must assume that the city officials will proceed in conformity to law."

The Supreme Court nevertheless held (page 406) that there was jurisdiction in the district court to entertain the bill, "as it presented questions arising under the 14th Amendment to the federal constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court. We think the elaborate and careful opinion of the District Judge of itself shows that substantial questions arising under the federal constitution were presented by the bill, and that the court had jurisdiction." On the merits, however, the court held that the ordinances in question were binding contracts, and that the company was not relieved from their performance, although war conditions had made continued performance ruinous to the company.

Now, in the case at bar the bill avers that notwithstanding the expiration of the original franchises for part of the Fort Street and Woodward lines, the company has acquired the right to continue the maintenance and operation thereof until such time as the discontinuance of such maintenance and operation shall be consistent with the public interest. It also avers that the proposed municipal system cannot be established without either purchasing these lines or removing them and constructing new city lines in their place, and that it is the intent of the municipal authorities, defendants in this suit, to compel plaintiff to sell these lines to the city at an inadequate price, by the threat to exercise the power of removal.

This right to continue is based upon two grounds:

(a) The action of the city authorities in granting and recognizing the company's right to continued opera-

tion of these lines both by the Kronk Ordinance, (Exhibit 4b, R. p. 47) of which it was said by this court in *Detroit United Railways vs. Detroit*, 248 U. S., 429. (See page 436) that it "amounted to a grant to the company for further operation of the system during the life of the ordinance," and by the arrangement made with the approval of the Common Council in June, 1919, embodied in a decree of the Wayne Circuit Court, for continued operation of the company's entire city system at a uniform fare and for a certain time, and thereafter at a fare to be determined by arbitration. (Exhibits 4-c-d and e, R. p. 48-50.)

(b) The company's expenditure in reconstruction and improvement of these lines after the expiration of the original franchises, under the order and with the permission of the City authorities, and with the consent and acquiescence of the people of the city and their official representatives, and the continued operation of those lines for some seven years since the decree in the Fort Street Case.

Under the Denver case (246 U. S., 178), the rights acquired by the company by reason of these facts are indeterminate franchises in these parts of the Fort and and Woodward lines, terminable only when the public interest warrants such termination and therefore only when the city is legally in a position to provide, otherwise than through the company's operation of these lines, the service that the public needs. But this is not the only condition that must be fulfilled before these franchises can be terminated. The continuance of service on the lines in question required large expenditures upon them, which the company made with the direction and approval of the people and their representatives. It fol-

lows, therefore, that if and when the city, being legally authorized to provide a system of its own, undertakes to do so and to terminate these indeterminate franchises, it must make fair compensation to the company for the property in the lines which these franchises cover and which was created and maintained by these expenditures.

If it undertakes to establish a system without legal authority, taking over or removing our property in so doing, as it necessarily must, or if, although legally authorized to establish its own system, it undertakes to acquire or remove our property in these lines by illegal means or without making fair compensation for it, in either case it is taking property without due process of law.

The bill charges lack of authority to establish a city system on account of the invalidity of the adoption of the proposition to acquire. It also charges that it is proposed to acquire or remove the company's property by illegal means and without making fair compensation. These charges go to the merits and are discussed in that part of the brief dealing with the merits, but both charges are involved in the jurisdictional question also, the charge of invalidity as well as the charge of an attempt to acquire or remove without fair compensation. For if the company has the right to continue until the city obtains legal authority to provide a system of its own and until compensation is provided for the property taken or destroyed in the establishment of that system, a taking of the property without compliance with each of these conditions is a taking without due process of law.

Even if it were true—and we insist that it is not true—that the city authorities of Detroit can at any time put an end to appellant's right to operate its non-franchise lines by a legitimate exercise of their power to compel a cessation of operation and a removal of trackage, it is none the less true that under the averments of the bill, the city intends and threatens to deprive appellant of its constitutional rights.

Because of the circumstances pointed out and discussed on pages 28-30 of this brief, appellant has the right to operate its non-franchise lines and this right will continue at least until the city authorities lawfully exercise the power to compel a cessation of operation and a removal of trackage.

Under the averments of appellant's bill of complaint admitted to be true, the city authorities do not intend to lawfully exercise that power. What they propose to do is this: to order appellant to cease operation and remove its tracks, not for the purpose of having said tracks removed—for that is precisely what they do not want—but solely for the purpose of coercing appellant into making a contract for the sale of said trackage for an inadequate compensation, or, as stated in appellant's bill (R. p. 16):

“The claimed power of so ordering said tracks and equipment to be removed from said streets is to be exercised only as a pretext and subterfuge for the accomplishing of the said iniquitous scheme of taking said property from the plaintiff for use as a street railway in its precise present condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor.”

This we contend is an unlawful threat to exercise the power in question and will result if it succeeds in a confiscation of appellant's property in contravention of the 14th Amendment. In effect it is nothing less than a direct arbitrary attempt to get appellant's property for the public without paying adequate compensation therefor. There is no excuse for this, for the law of Michigan gives to the city the power to acquire this property lawfully, namely, by condemnation, and we respectfully submit that the Court should hold that in the circumstances of this case the city must resort to that power.

Possibly it may be said that inasmuch as the city's order to cease operation and to remove the tracks will not be made with the intention that appellant should comply therewith, no harm will result to appellant. In answer to this we say: It must be supposed that whatever methods can be devised to make this scheme a success will be employed. It is quite easy to conceive of such methods, especially when it is remembered that all the municipal officers whose co-operation is necessary to the accomplishment of that scheme, are appointees of the Mayor (who was the original proposer and principal advocate of this scheme) and removable at his will, and they are subservient to his will and will conform thereto (R. pp. 21-22.) While it is not to be supposed that they will actually tear up and remove a large part of the trackage—for that would defeat the purpose of the scheme—it is to be supposed that they will compel appellant to cease operations and proceed so far in executing the threat of removal as may be necessary to compel appellant to sign a contract to sell its railway on terms satisfactory to the city.

Possibly it may be said that to enjoin the city authorities from thus using their power to order a cessation of operation and a removal of trackage from appellant's non-franchise tracks, is an improper interference with the exercise of that power. The answer to that is that they have no lawful right to exercise that power unless they actually desire to have that operation cease and those tracks removed.

The power to order removal is given to effect a removal—to clear the streets for other traffic or to enable the construction of other lines. This power is limited by the end for which it is given, and can be exercised only to accomplish that end. To use it, not to obtain the removal of the tracks, but to force the company to sell them to the city at less than their value, rather than suffer the greater loss incident to their removal, is a perversion of the power to accomplish the design of acquiring the company's property without making fair compensation. This is an abuse of the power to accomplish an unlawful end.

Nor can it be said that our construction of the power under consideration will result in giving appellant any improper advantage or in depriving the city authorities of any proper advantage, for appellant during the time it operates the lines can always be compelled to charge only reasonable rates, and if the city wishes to acquire them it can always do so by paying no more than they are actually worth.

Moreover, it may be said that both the *Denver case*, 246 U. S., and the *Detroit Railway case*, 248 U. S., which hold that the power to require removal did not give the public authorities the right to obtain the use of these railways without fair and reasonable compensa-

tion, are authorities for the proposition that it does not give them the right to take the *corpus* of this property without fair and reasonable compensation.

Perhaps it will be claimed that *Denver vs. New York Trust Company*, 229 U. S. 123, and the *Newburyport case*, 193 U. S. 561, are authorities opposed to the foregoing reasoning. These cases, however, are clearly distinguishable. In each of them the city proposed to construct a municipal plant, as it lawfully might, unless the company owning and operating a public utility would sell its plant to the city for less than its value. In neither case did it appear that the city merely intended by the threat of using its power of construction to coerce the owner of the utility into making a contract to sell the same for much less than it was worth. Indeed, in the latter case the Court after discussing the facts—which are not at all like the facts in this case—said, speaking through the present Chief Justice:

“And these considerations take this case out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from, or advantage gained over another by coercing his will by means of threats, even of the doing of a lawful act” (193 U. S. 578).

Nor is it true, as urged by appellees in their brief in support of their motion to dismiss or affirm, that there is no relation between our Federal Constitutional objections and the proposition of street railway acquisition which we assail. The answer to this is found in the averments of the bill of complaint. The bill avers:

“That it is the claim of the defendants that the effect of the vote of the electors * * * gives them, as city officials, full power and authority to compel said plaintiff to sell to the city its trackage

on Woodward Avenue and on Fort Street and on the day-to-day lines heretofore described, for \$40,000.00 per mile, which as heretofore stated, is very much less than its real value and very much less than it would cost the city if it constructed the same; and as to the day-to-day lines, it is very much less than the cost of the said lines to the plaintiff, less depreciation. * * * That it is the intention of said defendants to enforce said claim and they have threatened to do so; and plaintiff upon information and belief says they intend immediately to take steps to enforce it. * * * That it is the intent and purpose of said defendants * * * —which purpose they have threatened to execute—to say to plaintiff, 'You must either sell your trackage at the inadequate price the city offers or cease operating your cars thereon and tear up and remove the same from the streets' * * *. That it is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will, and who will conform to his will, to resort to other illegal means to compel plaintiff to assent to a sale of its said property for said inadequate value * * * and that it is the intention of said defendant Couzens, acting as Mayor of the City of Detroit, and of the other defendants who are subservient to his will, and who will execute his will, to at once put in force said street railway proposition, and upon the assumption, too, that this gives the city officials the authority to compel plaintiff to sell its trackage as aforesaid without giving plaintiff or any other persons the opportunity of having an adjudication as to the legality of the same" (R. pp. 20-21).

It cannot be claimed under these averments admitted to be true, that the disaster which appellant apprehends is not imminent and that it will only come as a result of court proceedings. Upon the contrary, these averments prove that it is imminent and that it will not come as a result of court proceedings.

It is true that because of the provisions of the city charter set forth on page 18 of the Record, the city authorities cannot acquire appellant's railway by a contract of purchase until that contract is approved by a vote of three-fifths of the electors; but these provisions do not prevent the city authorities, the defendants in this suit, from extorting from appellants by the means above described, a contract to sell its railway on the terms above indicated.

If we are right in our contention that the extortion of this contract by these means is an illegal and unconstitutional exercise of the city's power—and we submit we are—the relation between the threatened deprivation of our property rights and the proposition of acquisition is intimate and direct.

If there will ever come a time when we have a right to invoke judicial relief to prevent the threatened invasion of our constitutional rights, that time had come when this bill of complaint was filed.

Federal jurisdiction exists where the existence of a constitutional question is averred, unless, in the language of Chief Justice White in *Newburyport Water Co. vs. Newburyport*, 193 U. S., 561 (see page 576) "it plainly appears that such averment is not real and substantial, but is without color of merit." The averments in the present case, under the authorities above cited, are clearly sufficient to give jurisdiction.

II

The grounds for equitable relief set up in the Bill are these:

1. The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

(a) Because the proposition was to acquire a street railway system by construction, not only on streets where there were not existing lines, but also on streets where lines did exist and it was not so submitted to the voters.

(b) Because the proposition was so submitted as to get the affirmative vote of a large number of electors who voted therefor, believing that the scheme of street railway acquisition was to purchase the existing trackage of appellant on the streets mentioned in the proposition, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(c) Because the proposition was so submitted as to get the affirmative vote both of those favoring and of those opposed to purchasing the existing trackage of appellant on the streets mentioned therein, and it is to be presumed that otherwise it would not have received the vote of the requisite number of the electors (60% of the total number of those voting).

(d) Because the proposition submitted to the voters was substantially defective and deceptive in that it

authorized fifteen million dollars of bonds only to acquire a complete system, when it was known to the city officials who framed and submitted the proposition at the time of the submission, that this amount was grossly inadequate for the purpose, and also in that said system included lines to be constructed in Highland Park and Hamtramck, which are separate municipal corporations and in which no authority for such construction can be lawfully obtained by the City of Detroit.

2. That the scheme of acquisition of which the proposition voted on is a part, involved in effect an attempt to deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of the Federal Constitution.

We will discuss these propositions separately.

The proposition to acquire the street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

We stated four reasons 'a', 'b', 'c', and 'd', for this proposition. We will discuss reasons 'a', 'b', and 'c' together.

The ordinance provided for the acquisition of a street railway system on two classes of streets: On those where there were, and those where there were not existing street railways. The ordinance, in explicit terms, provided for the acquisition of the entire system by construction. It contained these words (R. p. 33):

"and said Board of Street Railway Commissioners shall construct, own, maintain and operate for

said City of Detroit * * a system of street railways upon the surface of the streets, avenues and public places herein designated."

This ordinance was ineffectual, unless the proposition of acquisition, which it contained, was approved by the electors of the city under the following provision of the State Constitution :

"nor shall any city or village acquire any public utility * * unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election."

(Constitution of Michigan, Article VIII, Sec. 25).

The Common Council of the city, who framed the ordinance also had the duty of framing and did frame the proposition to be submitted to the electors, but in doing so they omitted the language of the ordinance above quoted, limiting the methods of acquisition of the entire system to construction, and used the following ambiguous language (R. pp. 34, 40) :

"Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system * * as hereinafter designated (following with the description of the different lines) * * so as to make a complete street railway system and to make the necessary purchases of lands * * and things necessary to construct, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places herein designated, and to purchase or construct such * * buildings as may be required to maintain and operate said street railway system."

So that it is not true, as stated in appellees brief in support of its motion to dismiss or affirm, page 23.

"A reading of the ballot, whose language was prescribed fully in section 2 of the Ordinance (R. p. 34), shows that the proposition was fully described in precise elaboration, and that nobody could misunderstand it."

What is true is this, that by omitting the words requiring construction, the proposition of acquisition submitted to the voters was ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction, although the ordinance by the language omitted from the proposition submitted, explicitly requires construction and (because of the requirements of the charter set forth on page 18 of the Record) does not authorize purchase. Taking advantage of this ambiguity and having in mind the fact that a large proportion of voters desired (See Record p. 11) to purchase existing lines and to use the power of construction only where there were no such lines, the city officials charged with the duty of submitting the proposition, issued and distributed among the voters, before the election, in the effective manner herein set forth, sample ballots setting forth the proposed plan. (Record pp. 12 & 13) (See Exhibit 6, sample ballot opposite p. 52). This was designated on its face "official information." It was issued officially by the Common Council under its authority to make the submission and the expense of issuing and distributing the same was paid for by the city. (See appellant's motion to amend, R. pp. 61-64 and the disposition thereof, p. 65).

This "official information" set forth what was called the financial plan for 'A' and 'B' Lines, as follows:

FINANCIAL PLAN FOR 'A' AND 'B' LINES.

Present trackage to be taken over at cost less depreciation as specified at the time company was given permission by city to build under a Day-to-Day agreement:

34.25 miles estimated at \$40,000.00....	\$ 1,370,000.00
Fort and Woodward tracks where franchise has expired 21.25 miles estimated at \$40,000.00.....	850,000.00
New tracks in unserved districts, 100.75 miles estimated at \$70,000.00.	7,052,500.00
400 new electric motor cars estimated at \$10,000 each.....	4,000,000.00
150 new trailers estimated at \$5,000.00 each	750,000.00
(If the Ford gas car is used, the cost of cars will be reduced about fifty per cent)	
Car Barns, tools, etc.....	1,000,000.00

Total \$15,022,500.00

This \$15,000,000.00 bond issue is for 30 years and will be paid by yearly installments through that period.

The Class "C" Lines, consisting of 62 miles, will be developed as soon as 'A' and 'B' are in operation.

The \$15,000,000.00 bond issue covers the building, equipping and where it is proposed, the taking over, of a total of 156 miles of the complete system of 218 miles."

The falsity of the representation that these lines would be taken over is obvious, when it is borne in mind that the ordinance in explicit terms required them to be constructed. It is true that these sample ballots with the official information thereon did not reach all the voters; as to this plaintiff's Bill of Complaint avers:

"Sample ballots, with the official information endorsed thereon, were distributed prior to the last day for the registering of the voters to vote at said election on April 5th, and at addresses taken from the previous registration lists." (This means their residence addresses).

"By reason of the fact that large numbers of electors who had previously registered had changed their residence and the further fact that large numbers of new voters for the first time registered at the date of last registration, to-wit: on March 20th, many thousand electors who voted upon the proposition above referred to on April 5th, to-wit: a number exceeding ten per cent thereof, had not received and did not receive or have the benefit of the sample ballot with the explanatory information endorsed thereon to guide them in reaching their decision as to how they desired to vote, while the greater number, to-wit: a number exceeding seventy-five per cent thereof, had received such sample ballot with such official information endorsed thereon. That by reason of such situation, large numbers, aggregating many thousands, voted upon said proposition on April 5th with different understandings as to the question to be determined at the election of April 5th." (Record pp. 13-14).

In the light of these facts we are to determine whether the proposition to acquire was so submitted to the voters that their affirmative vote therefor authorized the acquisition, and in doing this, we must bear in mind that the ordinance upon which they were to vote made acquisition by construction mandatory, and that this meant that the existing trackage of appellant upon the streets specified in the ordinance should be removed and new trackage constructed by the city.

Whatever may be said concerning the votes of those who did not receive the sample ballot—a subject discussed later in this brief—it is clear that those who did receive them and gave credit to the statements thereon, were deceived.

As the bill avers (R. p. 17):

“The municipal authorities * * did induce them to credit their official statements, representing that where these street railways existed they would be taken over”

it follows that these electors were thus induced to vote for a proposition to derange the existing transportation system of the city of Detroit in the belief that they were voting not to disturb that system. And it was no small number of them who were thus deceived. As already pointed out, the bill avers that over seventy-five per cent of those voting on the proposition received these sample ballots with the official information thereon and we are abundantly justified in our claim (b) that it is to be presumed that the proposition would not have received the vote of the requisite number of the electors had not this deception been practised. It is likewise true that owing to the fact that over ten per cent of the voters (and this means over 14,000 of them) did not receive the sample ballot, and for other reasons hereinafter

stated, many of those who voted for it did so because they believed that they were voting for a proposition to remove appellant's trackage and to construct new trackage in its stead, and therefore we are justified in our claim:

(c) That the proposition was so submitted as to get the affirmative vote both of those favoring and those opposed to purchasing the existing trackage of appellant.

It is to be observed too that while the sample ballot distinctly assures the voter that existing trackage will be taken over, it is nevertheless true that it was so gotten up as to induce every elector favorable to municipal street railway acquisition, by any method whatsoever (that is, those voters favorable to a purely constructive acquisition as well as those favorable to an acquisition by purchase), to vote for it, for in very large letters on the face of the ballot it is stated: (see Exhibit 6, opposite to page 52).

"INSTRUCTIONS: IF YOU FAVOR THE ACQUISITION, OWNERSHIP, MAINTENANCE AND OPERATION OF A MUNICIPALLY OWNED STREET RAILWAY SYSTEM IN THE CITY OF DETROIT, MARK A CROSS (X) IN THE SQUARE AFTER THE WORD YES. IF YOU DO NOT FAVOR SUCH A PROPOSITION, MARK A CROSS (X) IN THE SQUARE AFTER THE WORD NO."

It is also to be noted that by the statement on the sample ballot that the day-to-day "trackage is to be taken over at cost less depreciation," the city did not commit itself to such taking over, because no contract to purchase was submitted, as required by the provisions of the Charter quoted on page 18 of the Record, and that this was omitted:

"So the city might be free to order these tracks torn out and replaced with city built lines," and to get for the proposition the votes, both of those who favored and of those who opposed acquisition by construction. (See published interview of corporation counsel Wilcox who drafted the ordinance, R. p. 11).

It is difficult to understand why any one should vote for a proposition which committed the city authorities to the project of removing the existing trackage and replacing it by trackage constructed by the city. That, however, is the project of the ordinance. It is a project devoid of sense and honesty: equally opposed to the best interests of the city and of the company, and yet there were in the city of Detroit, a city of a million inhabitants, "a large number of voters" who favored it (Record p. 11) and who doubtless voted for it.

Of course these voters are reckless and thoughtless and constitute a class much smaller than the sane and thoughtful who would vote for a project of street railway acquisition which did not derange the city's existing transportation system. Just how many of these reckless and thoughtless voted for the proposition, believing it to be a proposition of construction, cannot of course be known, but under the circumstances above stated the submission should not be held valid, on the ground that they were so small in number as not to affect the vote; on the contrary, it should be presumed that their number was sufficiently large to justify our claim that otherwise the proposition would not have received the requisite majority of electors. (The excess over the requisite majority was only 5,059). The illegality of such a submission is obvious; for whatever course the public

authorities might thereafter take, whether they proceed to acquire by purchase or by construction, would be diametrically opposed to the intent of one or the other of these classes of electors whose votes were indispensably necessary.

But it is said for a variety of reasons which will be hereafter discussed, that a court is powerless to afford relief upon the ground that the voters were deceived by the official assurances above described. Even if this were true—and we deny that it is true—we nevertheless contend that if these official assurances are disregarded, there was no valid submission of the real proposition of acquisition, because of the omission therefrom of the language of the ordinance saying, “said Board of Street Railway Commissioners shall construct” these street railways. Had these words been in the proposition submitted—and we can conceive no honest reason for omitting them—the voters, had not the proposition been misrepresented, could not have misunderstood it. With these words omitted, it was, as we have already stated, ambiguous and susceptible of being understood as authorizing acquirement either by purchase or by construction.

However, it is not true that the courts are powerless to afford redress for the deception effected by the official misrepresentations above described.

Counsel for the city in their argument on the motion to dismiss in the trial court argued (and their argument was adopted by the District Judge, see his oral opinion, (Record p. 59) that what representations were made during the campaign, whether true or false, were immaterial and could not be enquired into. That the statements made to the electors regarding the meaning and effect of

the proposition, though made by the officials charged with the duty of submission, could not be considered as official acts, and in no respect differed from statements made in newspapers, and on the stump, by persons having no official character; that these misrepresentations were representations as to the construction and legal effect of the proposition submitted; that the ordinance itself (which contained the language requiring the system to be acquired by construction only) was correctly published, and that the voters must be presumed to know the law, and, therefore, to have known that the statements made to them were false, that the voters were acting in a quasi legislative capacity, and that therefore their motives and the reasons that influenced them could not be enquired into.

In answer to this argument we quote from the Brief of former Justice Hughes filed as counsel for appellant in opposition to appellee's motion to dismiss or affirm:

"Fortunately there is no such absurd and artificial rule of law. The City authorities were not acting outside their power in formulating the submission. To have a valid submission it was necessary that they should act validly within their power. The position taken by the District Court that the motives of electors and legislators cannot be inquired into is beside the point and its statement that the acts complained of were 'unofficial acts' is, we submit, erroneous and shows an entire misconception of the case.

"This is apparent from the fact that prior to this special election and by the amendment of the Charter of the City of Detroit, adopted April 7, 1919 (Title III, Chapter I, Sec. 13), the administrative powers and duties of the Common

Council of the City were defined so as to embrace the following:

(e) To submit to the electors of the City of Detroit at any election, general or special, propositions by law required or permitted to be submitted to said electors, bonds by law required or permitted to be submitted to said electors, questions or matters by law required or permitted to be submitted to said electors, and all propositions, questions or matters upon which said Common Council desires the vote of said electors.'

"The Common Council thus had the authority to submit the proposition to the electors, and the most elementary principle requires that the Common Council in exercising this authority should make the submission fairly and in a manner not calculated to mislead and deceive the voters.

"In thus providing for the submission, it was also plainly within the power of the Common Council to give to the electors convenient sample ballots with information as to the purport of the submission. To say that the Common Council may submit to the electors propositions and not do those ordinary and appropriate things which go with the submission in order to make it intelligible, would be, as it seems to us, a most extraordinary and unwarranted ruling. It is alleged in the bill of complaint that the City and Mayor and Common Council caused to be prepared and distributed to the voters some weeks prior to the election of April 5, 1920, what purported to be a sample ballot and setting forth the proposed plan (Transcript pp. 12, 13; see Ex. 6, sample ballot opposite p. 52). This was designated on its face

as ('Official Information'.) It was issued officially by the Common Council under its authority to make the submission."

The proposition was long, involved, technical and ambiguous. It needed an explanation, and the council, whose duty it was to submit it, had the right to explain it. In explaining it, by publishing and distributing these sample ballots with the official information thereon, the Common Council was exercising its power of submission. If the official statement that these lines were "*to be taken over,*" had been printed on the ballot, no one would contend that there was a legal submission of the proposition to construct these lines. But the assurance given by the Common Council by publication and distribution of the sample ballots was even more effective than had it been printed upon the ballot. It was distributed at their homes long enough before election to give them an opportunity for examination and consideration, to the end that they might reach a deliberate judgment upon the important question which they were called upon to decide. This court would refuse to see a manifest truth if it failed to recognize the potency of such assurance. It should not fail to see that by study of these ballots and the information thereon, in their own homes the voters decided how they would vote and thereafter went to the polls and registered that decision. If it is held that these assurances are not to be regarded because not printed on the ballot, then a legal way is opened to the officials submitting the proposition to nullify the constitutional provision requiring the submission. In that case the constitutional provision requiring submission can be entirely disregarded by those whose power it was intended to limit. Surely officials charged with the duty of submitting a proposition can-

not so submit it as to obtain an affirmative vote therefor by official false pretenses.

As the duty of submission involves a duty not to deceive the voters as to the meaning of the proposition submitted, there was no such submission here as the law requires, and therefore no valid adoption of that proposition. Even if the adoption of a proposition be a quasi legislative act, which may be doubted, a valid submission is a necessary condition precedent to a valid adoption.

It may also be said concerning appellee's claim that it is to be presumed that the voters got their knowledge of the ordinance by reading the official publication thereof—a presumption impossible of application in this case—that in Michigan there is no such presumption. (See *Black vs. Common Council*, 119 Mich. 571), an authority which holds that there is no presumption from the publication of the ordinance that the voters saw it.

It may be said, too, that if the misrepresentations under consideration did involve a misrepresentation of law, they were in substance and effect nothing less than direct misrepresentations of fact, deliberately made for the purpose of effecting a deception and they accomplished that purpose, and even if they did involve a misrepresentation of law, courts will not for that reason refuse redress. Indeed, it is held that misrepresentations of law made by those standing in fiduciary relations invalidate the resulting transactions:

2 Pom. Eq. Jur., 4th Ed., 848.

Ludington vs. Patton, 111 Wis. 208.

Prince de Bearn vs. Winans, 111 Md. 434.

Tompkins vs. Hollister, 60 Mich. 470 (see p. 480).

Carpenter vs. Forging Co., 191 Mich. 45 (see p. 53).

Stevens vs. Collison, 249 Ill. 225.

Hall vs. Otterson, 52 N. J. Equity, 522.

The following authorities sustain our claim that the submission in question was invalid.

Judge Dillon, in discussing the submission of bonding propositions to popular vote, states that "Even when there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be submitted *in such manner as to enable the voters intelligently* to express their opinion upon it." (2 Dillon, *Municipal Corporations*, 4th Ed., Sec. 891.)

Boseman vs. Sweet, 246 Fed. (C. C. A. 9th Circuit) 370. Here the statute provided that a three per cent debt limit should not be exceeded except when authorized by popular vote. A waterworks bond issue was submitted, the question being stated only as of the issue of waterworks bonds in a specified sum, without calling attention to the fact that such an issue would exceed the debt limit. The court held that the submission was bad because the voters were entitled to be specifically informed that the effect of the issue was to increase the limit.

O'Beirne vs. Elgin, 187 Illinois 581.

Here a submission was had under a statute which provided for printing on a submission ballot, in addition to the question submitted, words calculated to aid the voter in answering the question. The ballot submitting the question of the issue of bonds to provide for a municipal electric lighting plant, in addition to a statement of the question, shall bonds for the purpose of providing funds for the proposition mentioned in the ordinance printed herein, to the amount of \$162,000 be issued, con-

tained this: "If you favor municipal ownership vote yes; if you oppose municipal ownership vote no." This was held bad because "it was not intended that public officers charged with a duty to impartially submit a question to a vote of the people should use the ballot as a vehicle for information or argument as to the motives that might influence the voter in making his choice."

If the distribution by public officers, in connection with the submission of the question to popular vote, of an argument in favor of municipal ownership, vitiates the submission as the above case holds, the distribution of the document containing the "official information" in the present case vitiates the submission of the street railway proposition, for, not only does it contain false representations, but the sample ballot, on the back of it, is headed with: "Instructions: If you favor the acquisition, ownership, maintenance and operation of a municipally owned street railway system in the City of Detroit, mark a cross (X) in the square after the word Yes; if you do not favor such a proposition, mark a cross (X) in the square after the word No."

(d) The proposition voted on, in itself, and without reference to the misrepresentations above discussed, was substantially defective and deceptive in that it authorizes the issue of \$15,000,000.00 of bonds only, to acquire a complete system, when it was known to the city officials who framed and submitted the proposition, at the time of submission, that this amount was grossly inadequate for the purpose, and also in that the construction of the lines proposed as a part of the system in Highland Park and Hamtramck was impossible because in those municipalities the City of Detroit could not lawfully acquire any franchise rights.

The proposition on its face purports to authorize construction of a street railway system comprising the lines in Class C, as well as those in Classes A and B, and makes no distinction between them. It states that the \$15,000,000 to be borrowed is for the purpose of acquiring and owning "said street railway system." As already appears, the city authorities were fully aware that the \$15,000,000 would make no provision for the Class C lines which comprise some 55 miles of track (about a quarter of the complete system) for both the "official information" and the mayor's message explicitly show that no provision was made for these lines.

Defendant's counsel will contend, we presume, as they contended below, that the validity of the proposition and of its submission must be determined entirely from the language of the proposition itself, without regard to the misrepresentations of its meaning made by the "official information" or otherwise, but those representations at least show that the city officials knew the real situation, and that the complete system called for by the proposition would require millions of dollars more than the bond issue which was proposed for the purpose of acquiring it.

Beers vs. Watertown (South Dakota), 177 N. W. Reporter 502.

In this case the issue of certain bonds purporting to be authorized by popular vote was enjoined. Under the statute in force the Common Council had the power to appropriate money for the purchase or erection of any system, or part of a system, for the purpose of providing light, heat and power for municipal, industrial and domestic purposes, and to submit to the electors the question of the issue of bonds to provide funds for such

appropriation. They submitted the question in this form; whether the city should issue bonds in a specified amount for the purpose of constructing or purchasing a system for the purpose of providing light, heat and power for municipal, industrial and domestic purposes. The proposition carried. It was averred in the bill (the question arising upon demurrer) that the city council contemplates the immediate construction of a system for lighting the streets and furnishing power for pumping water; that the electors voted the bonds under the belief that the amount authorized was sufficient with which to provide a complete system, and that money would be used to provide a system furnishing electricity for all three purposes, municipal, industrial and domestic; that the amount authorized is wholly inadequate to provide a system for the three purposes, and that the council plan a system which will furnish light and power solely for municipal purposes. The court sustained the issue of an injunction, saying (p. 505):

“It may be that facts existed which would fully justify the council in providing an electric system for municipal purposes only; and it would certainly have full authority under the statute to do so if it had funds properly available for that purpose. It may be that the electors of the city would gladly authorize the issuance of bonds for the purpose of getting such a limited system; but they have not so voted. The council would have no right to use the funds from the bonds for purposes other than those contemplated by the electors. To knowingly start in to use these funds when the council knew that they were insufficient to accomplish the contemplated purposes, and when the council intended to provide a system

radically different than what the electors were led to expect, would be as gross a perversion of the funds as to use them for a purpose entirely strange to that for which they were authorized."

The case of *Wheeler vs. Denver* (C. C. A. 8th Circuit) 231. Fed., p. 8, which may be cited as against our position, is distinguishable. In that case under an explicit provision of the City Charter the electors authorized the issue of eight million dollars of bonds to provide a municipal water plant or system and everything incidental or necessary thereto, for supplying the city and its inhabitants with water for all uses and purposes. (See paragraphs 5 and 7 of the Charter, pp. 14 and 15 of the case.) It appeared that the amount authorized was entirely insufficient to construct a complete plant, and it was contended that as the voters only contemplated a complete plant, and did not vote upon the question of an issue to construct a partial or incomplete plant, it would be a fraud on the tax payers to permit the issue and use the bonds, the theory being that the voters would not have authorized the issue if they had known the system could not be built for that amount. The form of the submission did not appear, but it was in an amount and for a purpose explicitly authorized by the city charter. There is nothing in the case to indicate that when this submission was had it was known by the officials or by any one that there was reasonable ground to believe that the proposed bond issue would be inadequate for the purpose.

2. The scheme of acquisition, of which the proposition voted on is a part, involves in fact an attempt to deprive plaintiff of its property without due process of law in violation of the 14th Amendment.

As already stated (this brief p. 6) tracks upon the streets now occupied by those portions of the Fort Street line and the Woodward Avenue line, the original franchises of which have expired, are essential to the proposed municipal system, and municipal tracks thereon can only be acquired either by taking over the existing tracks of the plaintiff, or by removing those tracks and replacing them with new ones. The establishment of the proposed city system necessitates either getting our property by purchase or destroying it by removal.

It appears by explicit averment of the bill that notwithstanding the expiration of these original franchises, the company has, through municipal action recognizing the necessity of continued operation, and granting the right to continue, and through its own expenditures upon these lines since the expiration of the original grants, made by authority of the municipal officials and with their acquiescence and that of the people of the city, acquired the right to continue these tracks until their discontinuance shall be consistent with public interest.

If under these facts the city has lost the right of immediate ouster, which arose at the expiration of the original franchises, and the company has acquired a right to continued operation, that is a valuable property right which the city cannot terminate at its arbitrary will.

It is maintained by the defendants that because under the Michigan constitution, Article VIII, Sec. 25, a municipality cannot grant a public utility franchise not subject to revocation at its will without the affirmative vote of three-fifths of its electors voting thereon, the company has not acquired any right to continue these

tracks, but that their removal may be required now as it might have been at the time of the expiration of the original franchises.

Does this constitutional provision preclude the acquisition, without a popular vote, of a right in the nature of a franchise right, revocable whenever its termination shall be consistent with the public interest?

The question is whether such a right can be created either by grant or by estoppel. It is our position that although under the Michigan constitution a popular vote is necessary to validate the grant of a *term* franchise, a right, in the nature of a franchise, to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created either by consent or grant of the municipal officials, or, in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in, and tacit approval of, action taken under the direction of the municipal officials. In the present case the right to continue rests upon both grounds, grant and estoppel.

The constitutional prohibition against the grant, without popular vote, of any public utility franchise, not subject to revocation "at the will of the city or village," does not mean that rights acquired without a popular vote may be arbitrarily terminated. The public will, which determines the revocation, is not uncontrolled and absolute. It is to be exercised if and when the public interest requires, and not otherwise.

The Supreme Court of Michigan expressed this distinction in their decision in *Peck vs. Detroit United Railway*, 180 Mich. 343, where they sustained the validity of a franchise grant which by its terms was to be ended "by the Common Council or the people of the City of Detroit at their pleasure or caprice." The Court say that the most that can be claimed for the grant in question "is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed, it is revocable at the will of the city *when ever the public interest requires its termination.*" (See opinion, p. 347.)

The decision of *Denver vs. Denver Union Water Company*, 246 U. S. 178, necessarily involves the principle for which we contend.

The city ordinance, whose validity was attacked in that case, recited that the Water Company was a mere tenant by sufferance, and declared that it was made to regulate its charges "during the time it shall further act as a water carrier and tenant by sufferance in said streets." The ordinance was presented to the city council by initiated petition of electors, and was passed by the council without reference to popular vote (See opinion, p. 188). The Colorado Constitution contained, Article XX, Section 4, relating to the city and county of Denver, (I Mills Statutes, Colorado, p. c-277), the provision that "*no franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors.*"

(The brief for appellees on their motion to dismiss, states with reference to this case (see p. 21) that "There was no constitutional prohibition against such action.")

It was contended on behalf of the city that as the company was merely a tenant by sufferance, its property was subject to immediate removal at the arbitrary will of the city, and therefore must, for the purpose of fixing a reasonable return upon its value, be taken at junk value. The court, however, construed the ordinance (p. 190) as "the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver;" and held that the property of the company must therefore be valued as property in use.

In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*

In *Detroit United Railway vs. Detroit*, 248 U. S. 429, this court held an ordinance which purported to regulate the rates of fare on the company's entire city system, including both franchise and non-franchise lines, and which by its terms was to remain in force a year unless amended or repealed, to amount "to a grant to the company for further operation of the system during the life of the ordinance," which necessitated a fair return to the company upon its investment. The decision is based by the court upon the decision in the Denver case, although the provision of our state constitution is not referred to.

If such a right can be created by ordinance, it may equally be created by estoppel. What the Common Council might do to create a continuing right to operate the Fort and Woodward lines by passing an ordinance,

they might likewise do by recognizing the necessity of continued operation, and directing and permitting the expenditures which made continued operation possible. And the acquiescence of the people shows their approval of the action of the city officials.

The continued operation of these lines after the expiration of their franchises was necessary in the public interest and was so recognized by every one.

Early in 1909, the year when the city claims the Woodward Avenue franchise expired, and the year before the expiration of the Fort Street franchises, the Common Council authorized payment of the expense of an investigation of the street railway situation undertaken with a view to continuance of service in the future. To a bill filed to enjoin this payment from city funds, the city and its officials made answer as appears by the report of the case, *Attorney General vs. Circuit Judge*, 157 Mich. 615 (see pp. 617-618) saying among other things that certain street railway franchises are to expire in November, 1909, "That these defendants are informed and believe that the character of the population, the manner in which the city has been built, is such that street railway service is essential in order to accommodate the people from day to day. That it is necessary to take steps to continue the street car service. That the City of Detroit as a municipality is powerless to engage in this enterprise itself, and that it is incumbent upon the officers of the City of Detroit to make an investigation and ascertain, if possible, upon what terms and upon what conditions the city may continue to enjoy street railway facilities."

This was before the city was given the power to acquire a municipal street railway system. The course of

action of the city authorities directing and authorizing expenditure by the company to enable the continuance of the service, the necessity for which the city thus solemnly recognized, began immediately in 1909 and was pursued in the years following. It was provided for by the Common Council by ordinance and by resolution. There was needed, in order that operation might continue and the lines give efficient service, large and continued expenditure of money. Those expenditures were made in part under the explicit direction, and in all cases with the permission of the municipal officers. The public knew of these things, tacitly approved them, and have enjoyed their benefits for some seven years after the time when by the Fort Street decree, the city's power of ouster was made legally effective.

Defendants assert that notwithstanding these arrangements for continued operation, the company's expenditures upon the strength of them, and public acquiescence and approval, the Fort Street decree is still enforceable, and that the city may compel immediate removal of the line on that part of Woodward Avenue where the franchise expired in 1909.

It is held, however, in an early Michigan case, whose authority has never been questioned (*Ramsdell vs. Maxwell*, 32 Mich. 285) that where, after a decree for possession under a foreclosure sale upon which a writ of assistance might have issued, a new arrangement is made between the parties under which the mortgagor continues in possession, a writ of assistance cannot thereafter be issued, and the question of the right to continued possession cannot be determined on the application for such a writ, but must be litigated independently.

This is a direct authority that the Fort Street decree is no longer enforceable.

See also

Barlow vs. Beattie, 28 N. J. Equity 412.

Judge Dillon, in discussing this subject says that a municipal corporation

"does not own and cannot alien public streets or places, and no mere laches on its part or on that of its officers can defeat the right of the public thereto; yet there may grow up in consequence, private rights of more persuasive force in the particular case than those of the public. It will perhaps be found, that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted against the public but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are impliedly within ordinary limitation statutes. It is unsafe to recognize such a principle. But there is no danger in recognizing the principle of an *estoppel in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time but upon all the circumstances of the case to hold the public estopped or not as right and justice may require" (3 Dillon, Municipal Corporations, 5th Ed. Sec. 1194).

City Railway Company vs. Citizens Street Railway Company, 166 U. S. 557.

This case was an appeal by the Citizens Street Railway Company to enjoin the defendant from disturbing it

in the construction, operation and maintenance of its street car system. The right to injunction depended upon the validity of an ordinance extending the plaintiff's original franchise for seven years. It was attacked mainly on the ground of want of consideration for the extension. After the passage of the extending ordinance, the company had floated a refunding loan upon the strength of the extension. The court say (p. 566):

"While this transaction cannot properly be termed a legal consideration for the ordinance since the negotiation of the new loan was neither a benefit to the city nor a detriment to the Railway Company, yet we think that the subsequent negotiation of the loan operates against the city by way of estoppel. All that is necessary to create an estoppel in pais is to show that upon the faith of a certain action on the part of the city, which it had power to take, the company incurred a new liability; as for example, by the negotiation of a new loan and the issue of a new bond and mortgage to secure the same. Under such circumstances, justice to the bondholders who have in good faith invested their money in reliance upon the validity of such action demands that the city shall be held to its contract notwithstanding there may have been originally no consideration to support it."

Essex vs. New England Telegraph Company,
239 U. S. 313.

In this case the town of Essex was enjoined from interfering with the operation of lines owned by the appellee company, which was plaintiff below. It appeared that while the company had in 1884 made application pur-

suant to the Massachusetts statute to the Essex Selectmen for a right-of-way for their lines, that application was never granted, but shortly thereafter the lines in question were constructed and for some twenty years were maintained at large expense along the town highways, and that during many years no objection was made to their operation. After stating that had the records of the Selectmen shown that in response to the company's application they had given a writing specifying the location of the lines and character of the construction and they had been constructed accordingly, such lines would be protected against exclusion or other arbitrary action by the town, the opinion continues (p. 321):

"With full knowledge of all circumstances, the town authorities permitted the location and construction of lines along the highways, and for more than twenty years acquiesced in their maintenance and operation. The company has expended large sums of money and perfected a great instrumentality of interstate and foreign commerce, in the continued operation of which both the general public and the Government have an important interest. Under similar circumstances it has been determined, upon broad principles of equity, that an owner of land, occupied by a railroad without his previous consent, will be regarded as having acquiesced therein and be estopped from maintaining either trespass or ejectment (citing cases) and like reasons may demand similar protection to the possession of a telegraph company. A municipal corporation, under exceptional circumstances, may be held to have waived its rights or to have estopped itself. (Citing cases,

including the City Railway case above referred to and the section we have quoted in Dillon, Municipal Corporations.)"

In each of the two cases last cited, the municipality had power by a prescribed method to grant a franchise right, but that method was not pursued nor was any other method of grant adopted. It was held nevertheless to have been estopped by its acquiescence in the exercise of the right which might have been granted.

In providing for a public utility service by granting a franchise under which that service is to be rendered, the municipality is acting in its private and not its governmental capacity. In determining whether it is estopped to question the exercise of such a right which might have been granted, the courts proceed upon the same grounds and apply the same rules as in the case of a private individual.

Eau Claire Improvement Company vs. Eau Claire,
179 N. W. (Wis.) 2.

In the case at bar there was municipal power to grant the right which we claim. Admitting for the purpose of the argument that a popular vote would be necessary to the validity of such a grant, the people may estop themselves by their acquiescence in the exercise of the right in like manner as the municipal officials would estop themselves by a similar acquiescence had the right to make the grant lain in them.

As the company has, under the circumstances (as we have shown) a property right in the portions of the Fort and Woodward lines where the original franchises have expired, not terminable at the arbitrary will of the city, the scheme of acquisition of the proposed municipal system violates that right.

It is manifest that the property of the company in these lines will be taken without due process of law either if the adoption of the proposition for street railway acquisition by the electors (which is the only basis on which it is claimed that the city has authority to acquire a system) does not give valid authority to acquire, or if the plan of acquirement involves the taking of the company's property either by illegal means or without making fair compensation for it.

That the adoption of the proposition did not give the city valid authority to acquire a system we have already shown. (See this brief, pp. 38-55). That the plan of acquirement involves taking the company's property without making fair compensation and that the proposed means of acquisition (independently of the lack of valid authority to acquire a system) are in themselves illegal, is manifest.

To carry out its plan, the city must either obtain this Fort and Woodward trackage by purchase, or remove it and put in new tracks of its own. The scheme, as already shown, is to compel a sale at an inadequate price by threat of removal or actually and by illegal means to prosecute removal so far as may be necessary to force such a sale. Whether the property is taken by purchase or destroyed by removal fair compensation is not contemplated, and this plan is to be carried out at once without affording any opportunity to test its validity by legal proceedings. (See this brief, pp. 14-15).

Under the Denver case, 246 U. S. 178, the company has indeterminate franchises in these portions of the Fort and Woodward line, terminable only when the termination is consistent with public interest and therefore not before the city has obtained legal authority to provide

the service that the public needs, otherwise than through the company's operation of these lines. Nor can those franchises be terminated and the company's property in the lines which they cover be either taken over by the city or destroyed by removal, without making fair and adequate compensation for the property so taken. For the service which the public has needed, and which it has had since the original franchises upon these lines expired, could not have been furnished without large expenditure in reconstruction and maintenance of the lines. That expenditure the company made with the direction and approval of the people and their representatives. But for these circumstances it might be plausibly claimed that whenever the city was legally authorized to provide service itself, it was in a position to require a removal of the tracks, though even in that case it could not for reasons already pointed out, lawfully use that power as a means of compelling appellant to sell its tracks for an inadequate price.

This it may be said the city would have had a right to do when the original franchises expired, but it is plain that the city cannot, when it needs continuing service, confer upon the company the right to continue that service for an indefinite time and induce it to invest the money necessary to provide that service, without incurring an obligation to compensate fairly for the property thus created when it is in a legal position to provide its own service instead and elects to do so.

As for the illegality of the threatened removal of this trackage by which the city expects to compel its sale, it is sufficient to refer to the language of Judge Lurton in delivering the opinion of the Court in *Louisville Trust*

Company vs. City of Cincinnati, 76 Fed. (C. C. A. 6th Circuit) 296, see p. 317; "A litigant may not execute his own decree. If the adversary will not quietly surrender the subject of litigation, resort must be had to the court in which the right was declared for the proper legal writ, and for its regular execution." Much the less could the city without obtaining any adjudication upon the rights now claimed in the Fort and Woodward lines undertake by its own action to put the company off those streets.

That the execution of such a scheme would deprive plaintiff of its property without due process of law does not require argument. The cases are numerous and uniform.

Cuyahoga Power Co. vs. Akron, 240 U. S. 462;

Cincinnati vs. Traction Co., 245 U. S. 446;

are directly in point.

The case of *Denver vs. New York Trust Company*, 229 U. S. 123, cited by the defendants in the court below as supporting their claim that if the city's plan involved taking over the plaintiff's property as alleged, it would not therefore be objectionable on constitutional grounds, is contrary to their contention, as the following quotation from the opinion of the court shows (p. 141):

"The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection

is faulty in that it fails to recognize the real situation to which the charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant, *is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired*; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then can it be said that the proposal, expressed in the amendment, to purchase the company's plant at \$7,000,000 and to devote \$1,000,000 more to its betterment, or else to construct a new one at a cost of \$8,000,000, involves an unlawful deprivation of property or any right? * * * Whether \$7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question."

The words which we have italicized in the above quotation show the distinction, and show that had the company in that case had the right to continue in operation, the decision would have been otherwise.

The same distinction is emphasized in the case of *Newburyport Water Co. vs. Newburyport*, 193 U. S. 561, to which the opinion last cited refers. The water company in this case was operating under a charter repealable at legislative pleasure. The legislature authorized the municipality to purchase the company's plant, should the company elect to sell it, at a valuation to be ascertained as provided in the act; but, should the company refuse to sell, authorized the construction of a municipal plant. The company offered to sell, but being dissatisfied with

the valuation made, filed its bill to set aside the transaction, claiming that its sale was compulsory because the city was authorized, should it not sell, to erect its own plant, which would be ruinous to the company, and therefore that its property was taken without due process of law.

The court held, Mr. Justice White, now Chief Justice, writing the opinion—that inasmuch as the company's charter was not exclusive, and was repealable at will, no right of the company would have been infringed had the legislature authorized the construction of the municipal plant (which would destroy the value of the company's plant) without conditioning it upon the company's being given an opportunity to sell. This was held to take the case (see p. 578) "out of the reach of the authorities which are relied upon as establishing that one cannot enforce a contract benefit derived from or advantage gained over another by coercing his will by means of threats, even of the doing of a lawful act." It was held that the company's sale was therefore voluntary and not compulsory.

The argument thus far on this branch of the case has proceeded on the supposition that the city's scheme contemplates depriving the company of its property by illegal means.

If, however, it were the plan of the city either to compel the sale or enforce the removal of property which the company has a right—not terminable at the arbitrary will of the city—to continue in operation, accomplishing such purchase or removal through threat of legal proceedings or as a result of such proceedings, and not by illegal means, its proposed action would be an abuse of process and not due process of law, for its purpose would

be in effect the accomplishment of an unlawful end by action not in itself illegal. It would be in short within the scope of the authorities referred to by Mr. Chief Justice White in the Newburyport case as holding "that one cannot enforce a contract benefit derived from or advantage gained over another by coercing his will by means of threats even of the doing of a lawful act."

The cases are not indeed uniform, but there are numerous and weighty authorities to the effect that where action not illegal is threatened or taken for the purpose of compelling the making of a contract or obtaining some other advantage, the resulting transaction will be avoided.

Fillman vs. Ryon, 168 Pennsylvania, 484.

Here an arrest was made under a regular warrant and for probable cause, but for the purpose of extortion. The person arrested was allowed to recover the money that he was induced to pay by reason of his imprisonment.

From numerous cases to the same effect we select the following:

Marlatta vs. Weickgenant, 147 Mich. 266.

Morse vs. Woodworth, 155 Mass. 233.

Adams vs. Irving National Bank, 116 N. Y. 606.

City Bank vs. Kusworm, 88 Wis. 188.

See also *Silsbee vs. Webber*, 171 Mass. 378. In this case plaintiff's son had confessed to his employer that he had stolen money from him. To prevent the employer from telling her husband who was ill and whose reason plaintiff feared would be affected if the disclosure was made to him, plaintiff transferred certain property to the employer. It was held that she was entitled to recover

as for payment under duress, although what was threatened would not have been an actionable wrong. The court say, Mr. Justice Holmes writing the opinion, "If a contract is extorted by brutal and wicked means • • • the contract may be avoided by the party to whom the undue influence has been applied."

In the case at bar, as the bill avers (R. p. 14) the defendants do not design either the abandonment of use of the streets in question for street railway purposes or the construction of new lines thereon, but the proposed order of removal is designed, not for the purpose of obtaining their removal, but to force their sale to the city at less than their value. Whether lawful or not (our claim is that it is unlawful because use of illegal means is threatened) this proposed action of the city is for an unlawful purpose, namely, to compel the plaintiff to part with its property for less than its value. If such a transaction were consummated it would be set aside, and its consummation will be restrained in equity as an attempt to obtain property without due process of law.

Even if it were true—and we deny it is true—that the city authorities may at any time put an end to appellants' right of operating its non-franchise lines by a lawful exercise of the power to compel appellant to cease operation and to remove its tracks, it is none the less true, as pointed out on pp. 31-36 of this brief, that to use that power as the city intends and threatens to use it in this case, is unlawful and would result in depriving appellant of its constitutional rights. This is an argument just as applicable to our claim for relief as it is to our claim that the court has jurisdiction, and we think that it alone is sufficient to entitle appellant to relief, because the scheme of the city authorities

which they are attempting to carry out, necessarily involves the acquisition by purchase of the non-franchise lines, and without them the other lines to be constructed where there are now no tracks, will be useless.

We desire that the brief of former Justice Hughes herein referred to, filed by him as counsel for appellant in opposition to appellees motion to dismiss or affirm, be considered at the hearing on the merits with the same effect as if it were incorporated herein.

We submit, therefor, that the Federal court has jurisdiction: that the Bill states, both upon constitutional and upon local grounds, a case for equitable relief and that the decree should be reversed and the case remanded with appropriate instructions.

Respectfully submitted,

Elliott G. Stevenson,
Attorney for Appellant.

John C. Donnelly,
William L. Carpenter.
P. J. M. Hally.
H. E. Spalding.
of Counsel.

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920.**

<div style="display: flex; justify-content: space-between;"><div>DETROIT UNITED RAILWAY, vs. CITY OF DETROIT, et. al.,</div><div style="text-align: right;"><i>Appellant.</i> <i>Appellees.</i></div></div>	}	No. 492.
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MOTION TO DISMISS, AFFIRM OR ADVANCE

The appellee, the City of Detroit, comes and moves:

(1st) To dismiss the appeal in this cause for the reason that no Federal question is involved in the case which would authorize or justify the beginning of said suit in the United States Court or this appeal.

(2nd) In case the foregoing motion be denied said appellee moves to affirm the judgment of the District Court of the United States for the Eastern District of Michigan, for the reasons that it is manifest that the Court below had no jurisdiction and that the appeal is taken for vexatious reasons only and not because of merit in the questions, and because the questions involved are so frivolous as not to need further argument.

(3rd) In case both of the foregoing motions be denied, appellee moves to advance the cause and set the same for hearing at the earliest date which suits the convenience of the Court for the reasons stated in the affidavits of James Couzens and Joseph S. Goodwin attached hereto, and because of the great delay otherwise made necessary in the ordinary course of litigation in this Court and because great public interest imperatively needed public works and large sums are involved.

Clarence E. Wilcox,

Alfred Lucking,

Counsel for said Appellee.

A BRIEF STATEMENT OF THE FACTS:

The plaintiff, being the owner of the existing street railways in Detroit, filed this bill of complaint to prevent the City of Detroit from carrying into effect the expressed purpose of a vast majority of the citizens, to acquire additional lines of their own, including some streets where plaintiff is running cars but has no franchise. Detroit had more than doubled in population within the last ten years and the utter inability of the company to cope with the existing situation became so apparent and the inconveniences to citizens so great that the City Administration, headed by Mr. James Couzens, as Mayor submitted a proposal to the electors, as required by the Constitution and the law, to issue bonds for \$15,000,000 and authorize the City to acquire a municipal system on certain streets, covered by the proposal.

After an extended and heated discussion, participated in by all of the newspapers, and scores of public speakers, in which every phase of the proposition was debated from every angle, the proposal was carried by a vote of 88,585 to 50,776.

No sooner was the vote announced than this bill was filed by the street railway company to block the work. In addition thereto, five other trivial, vexatious suits relating to the same general subject matter were started by the plaintiff in the state and federal courts as shown by the affidavit of Mr. Couzens attached. One of these suits seeks to declare the election void because the paper on which the ballots were printed was too thin. The others are all based on technicalities as shown in the attached affidavits of Mr. Couzens. The representatives of the Railway Company stated in the public debates before the election that if the ordinance carried, the Railway Company would start suits to enjoin the work and prevent the sale of the bonds.

In 1910 the franchise of the plaintiff expired on the chief trunk lines and notwithstanding the express language to that effect, the plaintiff in defiance of the plain written word, claimed to have perpetual franchises in those streets. Fort Street was made a test case and the Supreme Court of Michigan held (and this was confirmed by the Supreme Court of the United States) that plaintiff's franchises having expired it had no further rights upon the streets and that it must vacate upon notice of 90 days given by the City Council. (See the Decree R. p. 43).

City of Detroit vs. Detroit United Railway, 172 Mich. 136;

Detroit United Ry. vs. Detroit, 229 U. S. 39.

This decree was made February 28th, 1913, and affirmed by the Supreme Court of the United States, May 26th, 1913.

Following that case a day-to-day arrangement was made between the Common Council and the Railroad Company fixing fares, revocable at the will of either party (R. pp. 44-46).

The Michigan Constitution of 1908 forbids the grant of any rights in the streets to a street railway company "which is not subject to revocation at the will of the City or Village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors." (Constitution, Article 8, Section 25).

Hence the Common Council gave only a revocable day to day license; and such has been the practice in Detroit on all streets where any new work has been done (R. pp. 23-26).

The great growth of Detroit rendered more mileage imperative and the Railway Company protested it could not get the money—at any rate it did not give the service, hence the City Administration formulated this plan, and obtained from the people the needed authority and money.

Notwithstanding every obstacle plaintiff has thrown in the way, the City's progress with its plan has been steady and marked. Many miles of the work on a number of the streets have been started and a large amount of work done (for details see the affidavit of Mr. Goodwin, General Manager of the Municipal Street Railway, attached hereto). Also notwithstanding the frantic and vexatious attempts of the plaintiff and its

attorneys to discredit the bonds and prevent their sale, more than one and one-half millions of these bonds have been absorbed by the general public (Affidavit of Mr. Couzens attached).

The Detroit United Railway has been very prosperous, paying 8% dividends on its watered Capital Stock—besides acquiring largely out of the Detroit earnings a vast interurban system and acquiring a large surplus (see affidavit of Mr. Couzens).

As to the rights of the City and the Railway Company upon the other (than Fort Street) streets where franchises have expired suit was brought in the State Courts on Aug. 27, 1918, by the City—to determine such rights and the case is now pending in the Supreme Court of Michigan (See affidavit of Mr. Couzens, pp. 39-40).

The Bill of Complaint in substance alleges three grounds for relief:

- (1st) That the Ordinance was void and not properly approved, by the people because the voters were misled and the ordinance improperly submitted.
- (2nd) That plaintiff has gained continuing rights in Fort Street and Woodward Avenue, since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case.
- (3rd) That the City officials were attempting in bad faith to threaten to throw plaintiff off Fort Street and Woodward Avenue with the real intent of compelling plaintiff to sell its property in said streets at an inadequate price.

We think the foregoing states the substance of plaintiff's grounds for relief although the bill of complaint is very long and very verbose and argumentative.

The defendant, City of Detroit, moved to dismiss the bill of complaint on two grounds:

First: That no Federal Question was shown to give the court jurisdiction, and,

Second: That there was no equity in the bill which entitled plaintiff to relief.

After argument Judge Tuttle held that he would take jurisdiction of the case not because any Federal question was really involved but because Plaintiff made a claim of one, apparently in good faith. The learned Judge then proceeded in an oral opinion of great clearness and perspicacity to point out that there was no equity in the bill on its face (R. pp. 57-60).

ARGUMENT

I

POINTS ON THE MOTION TO DISMISS BECAUSE
NO FEDERAL QUESTION IS INVOLVED

The Judge below, in his logical and illuminating opinion, which was delivered orally at the conclusion of the arguments, said:

"As I view it, the most difficult question is the one as to whether or not a Federal Constitutional question is involved. In the light of the recent decisions, I reached the conclusion that it is my duty to take jurisdiction of the case but I do so on the theory that the Federal question is raised in good faith, and not because when such question is properly answered the bills show any invasion of constitutional rights" (R. p. 57).

The learned Judge gave plaintiff credit for good faith in starting this suit although he promptly decided every question raised by plaintiff's counsel adversely.

We submit the Court was too generous,—there could be no good faith (belief in the ground for federal jurisdiction) without at least a plausible ground for it. We argue that good faith is not enough to give jurisdiction, but there must be a real substantial question about which open minds could differ (193 U. S. 561-2). We submit that such is not this case—that the ground is frivolous and without substantial merit.

The *only* ground alleged for Federal jurisdiction is that the City officers were attempting to force the plain-

tiff to sell its property in certain streets at an inadequate price by threatening and pretending that the council would order plaintiff to remove from those streets and forcing the Company to sell at a low price rather than be compelled to take the property away with the attendant sacrifice. From this the inference is drawn that it was a taking or a threatened taking without due process (R. pp. 16, 19-20, Brief pp. 6, 9).

On this subject the bill alleges:

"The method of accomplishing said dishonest and unlawful purpose the said mayor and some of his associates have many times openly and publicly stated to be (indeed, the intent and purpose to use this method is clearly indicated in the Mayor's message to the Common Council, Exhibit 5, and the sample ballot, Exhibit 6), that he will offer to plaintiff the sum of \$40,000.00 for each mile of track (including overhead equipment) so to be taken, which sum is—as is well known to said mayor and his associate defendants—less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associate defendant will order said tracks and equipment removed from said streets."

The bill sets forth the alleged threats, but the facts alleged do not bear out the charge of "threats to take at less than a fair price."

Mr. Couzens estimated the second-hand trackage and fixed equipment as worth \$40,000 per mile. New lines were estimated at \$70,000 per mile (R. pp. 52-53). Under the day-to-day agreements, the City and the Company agreed that the City should take over same at cost less depreciation (R. p. 25), and this trackage and equipment Mr. Couzens also estimated at \$40,000 per mile

(R. p. 52). This price may be too low or too high but it was never stated, speaking as to either of the lines, to be anything but an *estimate*. It is thus plain that all plaintiff's alleged fears of an evil intent to take at less than fair value are fanciful—merely imagined for the sake of jurisdiction.

But all the counsel on both sides agreed that the ordinance as adopted did not in any manner authorize the acquisition of plaintiff's property in said streets (Fort Street and Woodward Avenue) and that in order to acquire such property by purchase, an agreement with the Company must be entered into, a definite and specific agreement fixing the price, and then submitting it for approval to the vote of the people at another election (R. pp. 59, 80).

The Charter of Detroit forbids the taking of any street railway property by purchase except under a specific contract of purchase approved at an election by a three-fifths vote of the electorate (R. p. 18).

Likewise, the property could not be condemned except upon authority given by a three-fifths vote of the people (R. p. 18). The ordinance and election sought to be set aside in this case did neither of these.

All the counsel agreed before the Court below (R. pp. 59, 80) that none of the plaintiff's rails or other property in the streets could be taken by the City without another vote of the people, after a contract was arrived at with the assent of the plaintiff company.

Therefore, the pretended fear of the plaintiff that it was about to be forced by this ordinance and election into an agreement to sell at an inadequate price (which is the sole ground of Federal jurisdiction claimed in this case) is but a figment of the brain of counsel.

But Counsel for the plaintiff say to the City: "You may (in fact you intend to) force us to a low price below the true value, by threatening to order us to vacate the streets." If that were true, the city's right to order plaintiff off the streets is given or rather confirmed by the decisions of the Supreme Courts of Michigan and of the United States above cited. But such right does not arise out of and is not strengthened in any way by this ordinance or vote of the people. It can only be taken by orders of Common Council under the decree of the Court, and this order by the Common Council could still be passed and the plaintiff ordered off the streets even if the ordinance and election were declared void. This removal from Fort Street could have been commanded at any time since the decree in 1913 without any such ordinance as the one now attacked. There is no connection or relation between the election or ordinance sought to be set aside and the right to order the Company removed or the actual vote of ordering their removal.

The proposal to purchase plaintiff's lines on Fort Street and Woodward Avenue could not have been submitted in the ordinance in question because no agreement existed with the plaintiff and this was an essential preliminary. And likewise the purchase of plaintiff's lines in streets under the day to day agreements could not then have been submitted because such would require three essential preliminaries (1) that the City be first authorized to engage in municipal operation (2) that the City must actually engage in ownership and operation and (3) that the City must desire to operate a part of its system over such streets (R. p. 25). The way is cleared for all of these by the ordinance which was adopted. The acquisition of those lines from the plaintiff is still ahead of the City and when in due and orderly

course, that point is reached, it will be done according to law.

Thus, the only alleged ground for jurisdiction, viz: that the City or rather the defendant officials intended to order the railway company to remove its property off certain streets, or that the officials pretended that such steps would be taken, utterly fails because the ordinance affords no authority for such steps and it adds nothing to the power and right previously possessed by the City under the decisions of this Court and the Supreme Court of Michigan.

But, Counsel say, (brief p. 9) that the bill alleges it has rights in those streets, (Fort Street and Woodward Avenue) acquired subsequent to the decisions of the Supreme Courts of the United States and Michigan mentioned above, and that the Mayor and Common Council have decided upon a policy of forcing the plaintiff, without judicial action upon those acquired rights, to submit to having its property destroyed by removal and for the ultimate purpose of forcing plaintiff to dispose of its property at an inadequate price. (That such pretended after acquired rights cannot possibly have any existence is shown in this brief post pages 18-21.)

Whether plaintiff has any such after acquired right can be tried and determined when the Common Council attempts to order the plaintiff Railway off the said streets, but no such attempt has been made as yet and the first step will be the passage of a resolution in pursuance of the decree in the Fort Street case. When such attempt shall be made, if the plaintiff have such after acquired rights, the Court will protect them. If the City officials had such a plan in mind as alleged, their first step would be to either pass a resolution to remove or approach the plaintiff for a price, and that will

be time enough to litigate the question of after acquired rights. The question is not raised nor the alleged right questioned by the passage of this ordinance.

The City cannot force plaintiff into a contract of sale by physical force and if attempted the Courts will enjoin it,—but this ordinance has nothing to do with such a case.

The Ordinance is in no way essential to the City's right to eject plaintiff, which right existed before the ordinance in question was passed, and has not been fortified or strengthened in any way by such ordinance. The only effect of the passage of the ordinance is to provide the money (which might have been raised by taxation or other method) with which to build a system and to get the approval of the people to such system.

When the City comes to pass a resolution to eject or order plaintiff off the street the matter then comes at once to the Court under the decree already made in the Fort Street case for a Writ of Assistance, (See the Decree, R. p. 43) at which time plaintiff may set up its after acquired rights. And if the attempt were to eject from Woodward Avenue on the grounds that its franchise expired years ago, then the Court will protect any after acquired rights the Company may have.

In fact these questions are now being determined in the State Courts on a bill filed by the City to declare the respective rights in those streets (other than Fort Street) where franchises have expired.

We, Therefore, submit, from this very concise view of the jurisdictional question, that the alleged grounds for Federal Jurisdiction are frivolous and unsubstantial. Such a claim we submit could not be made in good faith because so manifestly absurd.

II.

ARGUMENT IN SUPPORT OF MOTION TO AFFIRM.

If the Court should be of opinion that a federal question is involved and should therefore deny the motion to dismiss, then we ask an affirmance of the decree below because the appeal is without merit and the questions on which decision of the case depends are so frivolous as to need no further argument.

In support of this motion we beg leave to refer the Court to the argument on motion to dismiss (Ante pp. 8-12). We also refer to the able opinion of the learned District Judge printed in the record on pages 57-60.

**WE URGE THAT THE BILL ON ITS FACE
DISCLOSES NO EQUITY.**

Three Grounds for equitable relief are alleged:

(1) Bad faith of the City officials in that they intend to threaten to remove plaintiff from the two streets in question with no real intention of doing it but only to compel plaintiff to sell at less than the fair value.

(2) That plaintiff has acquired additional term rights in Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and of Michigan in the Fort Street case, by reason of certain acts of recognition on the part of the City officials and that the City officials threaten to take possession of those streets ignoring the after acquired rights and without judicial determination of them.

(3) That the ordinance was void because the voters were misled and the ordinance was improperly submitted.

Of these three in their order:

FIRST: Bad faith on the part of the City officials in that they intend to try to compel plaintiff to sell its property in the two streets at an inadequate price by threatening to order the property removed without any real intention of compelling its removal.

This has already been quite fully answered under the Motion to Dismiss (Ante pp. 7-12).

But in addition, we submit that malicious intent of the Mayor to drive a "hard bargain" cannot be ground

for depriving the City of its rights—its unquestioned rights.

This Court held that the City had the right after a franchise expired to order plaintiff to remove its property. Is it possible that the City can be deprived of this right because some official intends to say to the Company, "If you are not willing to accept a certain price, the City will pass a resolution requiring you to remove your property?"

Or must the City rigidly hold to one of two courses, either to pay any price the plaintiff chooses to ask or adopt the alternative of compelling evacuation.

On the other hand, the Railway Company has a "big stick" in the negotiations, in that the City does not want service interrupted while removing the old railway and the building of the new. May not the Company use that "stick" in making a sale? To say it cannot do so is absurd. There is nothing illegal in its making use of such argument. The same is true of the City. It may urge that the Company would much better yield something from its notions of full value rather than scrap the materials.

Each side has a strong argument, and each may advance it without violating any legal or equitable right of the other.

We submit with all earnestness, that the City's rights cannot be taken away or the City estopped or enjoined from exercising its legal rights by any so-called evil intentions or evil motives of its officials. It would seem unnecessary to cite authorities for so elementary a rule.

McCrary vs. U. S., 195 U. S. 37,

People vs. Gardner, 143 Mich. 104,

People vs. Gibbs, 106 Mich. 127,

McDowell vs. Fuller, 183 Mich. 639, 648.

Second: The second claim is that plaintiff has been given permanent rights to Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case by reason of certain acts of recognition on the part of City officials including the Common Council.

The principal acts of recognition (and in fact the only ones set forth so that the Court can judge of their import) are the "seven for a quarter" arrangement, the "day to day agreements" for new lines and the so-called "Kronk Ordinance."

The "seven for a quarter" arrangement contained this clause "no existing rights of either party shall be impaired or affected by this temporary arrangement, except as herein explicitly stated, and it is a day to day arrangement only" (R. p. 45).

And further, it contained this clause:

"While this resolution shall be in force, the enforcement of the decree in the Fort Street case shall be suspended and immediately after repeal of this resolution, the present existing status as to such decree shall be restored, and the City may at once enforce the terms of said decree, the same as if this resolution were not passed" (R. p. 46).

Each of the agreements for new lines called "day to day agreements" contained even stronger language as follows:

"The Railway Company by its acceptance hereof gets no term rights in said streets and the Council or people of Detroit at their pleasure or caprice

may revoke the permit hereby granted and said Company will forthwith remove from the streets the property permitted to be placed therein under this grant. It is further agreed that the making and acceptance of this grant shall not be deemed to be a waiver of any of the rights of Detroit or of said Railway with reference to the construction, maintenance and operation of any lines of railway or street railway tracks now in said City and that each party hereby reserves all its rights whatever they may be, the same as if this grant had not been made or accepted."

And yet, in the face of these explicit stipulations of the most solemn nature, plaintiff in breach of every legal and moral obligation claims in this suit that these acts conferred upon it continuing rights in the streets of Detroit (R. pp. 8, 5, 6).

Is it any wonder the City authorities regard it as dangerous to have any dealings with this Company, which treats the most solemn engagements as mere "scraps of paper."

The Kronk Ordinance contained this final clause:

"This ordinance may be amended or repealed at any time by the Common Council. Unless so amended or repealed, it shall remain in force for one year" (R. p. 48).

The other acts and resolutions depended upon were stated in the most general terms in the bill (R. pp. 6, 7). The simplest rules of pleading require that if any dependence is placed upon the terms of such resolutions, that the terms (at least the important parts thereof) should be stated. But not only did the plaintiff fail to state the substance of any such acts or resolutions but it

positively refused to incorporate a sample of them in the record before the Court below (R. p. 65). In the absence of plaintiff stating explicitly the language on which it relies as conferring rights, such ambiguous allegations will be disregarded.

But why refer to these so-called acts of recognition in any detail? There is one decisive answer to all of them, one fact that deprives each and every one of them of any force whatsoever. They are swept aside by the simple statement, that even if the Common Council and every officer of Detroit had united in one express act or ordinance explicitly conferring upon plaintiff the rights which it would now have raised by implication or which it would have the Court infer from such ambiguous and indefinite conduct and resolutions, it would have been utterly void and of no effect.

The reason is that the *Constitution of Michigan* adopted in 1908 provides:

"Nor shall any city or village * * * grant any public utility franchise which is not subject to revocation at the will of the city or village unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city * * *." Article 8, Section 25, Constitution of 1908.

The City authorities having no power to grant directly rights in the streets except those revocable at will, cannot do so by indirection. Having no power to grant the same by express act, none such may be implied.

Eaton vs. Shiawassee Co., 218 Fed. 588.

Litchfield vs. Ballow, 114 U. S. 190, 193.

Hedger vs. Drdon Co., 150 U. S. 182.

Niles Water Works vs. Niles, 59 Mich. 311.

Detroit vs. Robinson, 38 Mich. 108.

Spitzer vs. Blanchard, 82 Mich. 246, 248.

McCurdy vs. Shiawassee Co., 154 Mich. 550.

In *Litchfield vs. Ballow*, *supra*, Mr. Justice Miller on this point said:

"If this provision is worth anything it is as effectual against the implied as the expressed promise and is as binding in a court of chancery as a court of law."

In *Spitzer vs. Blanchard*, *supra*, the Supreme Court of Michigan said:

"There can be no implied liability of a village where there can be no binding expressed contract."

In *Detroit vs. Robinson*, *supra*, the Court said:

"The City cannot be held liable for work done for its benefit as upon an implied contract, for the law will not imply a promise as against the City where it could not make an express contract."

In *McCurdy vs. Shiawassee County*, *supra*, the Supreme Court of Michigan said:

"All persons dealing with counties are bound to ascertain the limits of their authority fixed by statute or organic law and are chargeable with knowledge of such limits. 11 Cyc. 468 and cases cited. This Court has held that the doctrine of implied liability has no application in cases where the liability can only be created in a certain way. 56 Mich. 95."

Great numbers of authorities could be cited to support this proposition but it would seem unnecessary to extend the number.

It is alleged in plaintiff's bill that plaintiff has expended large sums on said Fort Street and Woodward Avenue, since the expiration of franchise "with the knowledge, acquiescence and either tacit or expressed approval of said City and its officials," and therefore the City having stood by and observed these expenditures, and reaped the benefits, the plaintiff has acquired permanent rights by acquiescence or estoppel (R. pp. 6, 7, 8).

But there can be no estoppel where both sides have equal knowledge of the lack of power. This rule of law and equity, which it seems is universal, does not require the citation of authorities. Nevertheless, we cite a few:

Tri-State Co. vs. City Thief River Falls, 183 Fed. 854.

State vs. Murphy, 34 L. R. A. 367.

Plumb vs. Grand Rapids, 81 Mich. 381.

MacDowell vs. Fuller, 183 Mich. 639.

Chippewa vs. Bennett, 185 Mich. 545.

It is not necessary to waste any sympathy on this plaintiff. It has made and is still making millions out of Detroit and it calculated well its chances in making such expenditures, knowing full well all about its rights under the Fort Street decisions (see the affidavit of Mr. Couzens, attached hereto).

Thus it is indisputable that the plaintiff railway has not in Detroit, Michigan, any new term rights in our streets.

In the Denver case 246 U. S., page 178, relied on in the Court below by plaintiff's counsel, the Common Council had full power to grant rights in the streets to the water company and the Court held that it had actually,

under the terms of the grant, done so. There was no Constitutional prohibition against such action, as in this case. In the present case if the Common Council had tried to do so expressly it would have been utterly void. Certainly it could not accomplish any more in that direction when it was not trying to do anything or confer any rights than if it had explicitly undertaken to confer such rights.

Third: With reference to the claim of counsel for plaintiff that the ELECTION AND ORDINANCE WERE VOID because of:

1. Misrepresentation by City officials to the electors.
2. Misunderstanding of the proposition by the electors.
3. That an exact copy of the whole ordinance was not printed on the ballot.

It is very hard to comprehend the involved and complicated reasoning of the plaintiff's bill on this subject. (See Record pages 11-21) and if it is not understandable that fact ought to be sufficient reason for dismissing such claim, because to over-turn an election—a decisive election on an important matter—should require very clear and explicit reasons.

It is well in the first place to note that the ordinance itself provides for just two things—first, the acquisition of the system and, second, the approval of the proposition by the electors to acquire municipal lines on those certain streets prescribed, and the voting of bonds for \$15,000,000 for the project.

Nothing else is in the ordinance—and this ordinance was published as required by law.

All of the complaints of counsel for plaintiff about misrepresentations of the ordinance and of misunderstandings by electors consist of extraneous alleged facts entirely outside of the ordinance.

They alleged the Mayor, and others, represented that it was not intended to *construct* on Fort Street and Woodward Avenue, but to take over those parts of the plaintiff's lines, *by purchase*, whereas the ordinance did not so provide. And that the Mayor represented that \$15,000,000 would do the work which, in fact, was not enough. These are the misrepresentations alleged (plaintiff's brief pages 6 and 7).

The ordinance itself only provides for the acquisition of a street railway on the routes described (ordinance, record pages 27-41). It says *nothing* about any purchase of plaintiff's lines on certain of those streets. But it is shown that the Mayor and other officials stated to the public, orally and in writing, that it was a part of the plan of procedure under the ordinance to purchase those two lines from the plaintiff. They lead the people to believe (say plaintiff's counsel) that the ordinance authorized that method, which was not true—hence the election must be set aside.

The learned Judge below on this point said:

"It is urged that the voters were deceived through oral and written statements of public officials into a misunderstanding of this ordinance. It was correctly published according to law. I hold that those acts complained of were unofficial acts and that they have no more bearing upon this legal proposition than they would if said by some private citizen or one of the papers in this city.

I hold that this Court cannot inquire into the things that influenced the voters, and as far as

I can go in that direction is to inquire whether or not the ballot on which this question was submitted was a proper ballot. As to the things done in the campaign by private individuals or public individuals, that is outside of the scope of proper investigation of this Court.

The form of the ballot and whether the question was submitted by a proper ballot and in a proper manner to the voters is a judicial question. It is not necessary under the law that the entire ordinance be on the ballot, but that it be fairly described and identified with the ordinance which has been published, in such a way that the public may know what it is they are voting on, and I hold that this ballot does properly submit that question to the voters of this city and did so submit it."

A reading of the ballot whose language was prescribed fully in Section 2 of the Ordinance (record page 34), shows that the proposition was fully described and with precise elaboration, and that nobody could misunderstand it. Not only so, but the ordinance was published and the proposition on the ballot might well and lawfully have been in much shorter and more compact shape, but great care was taken to make the ballot full and clear.

The authorities are explicit and uniform that all that is necessary to be put upon the ballot is a clear identification of the proposed law or ordinance to be voted upon, and sufficient to show its character and purpose.

State vs. Merritt, 10 L. R. A. (N. S.) 149.

Kreman vs. Portland, 57 Ore., 454.

Washington vs. Dancy, 4 Wash., 135.

State vs. Longworthy, 55 Ore., 303.

Olivers vs. Lainsville, (Ky.), 217 S. W., 907.

The ordinance having been published in *extenso*, according to law, the conclusive presumption of law is that the electors ascertained its terms and provisions from such published authorized text.

Jones vs. McDade (1917) 75 So., 988.

If an election is to be set aside because public speakers or newspapers make erroneous statements about the questions presented, no election in these days would stand. It is not admitted for a moment that any mis-statements were made in this instance—but as a matter of law, courts have no jurisdiction, we submit, to try the question as to what statements influence voters.

The voters in this instance were quasi legislators, and no rule is better settled than the one that courts will not and cannot determine what motives or reasons influenced them in voting as they did.

New Orleans vs. Warner, 175 U. S., 120.

McCray vs. U. S. 195, 37.

People vs. Gardner, 143 Mich., 104.

Soon Hing vs. Crowley, 113 U. S., 710.

People vs. Calder, 153 Mich., 724.

People vs. Gibbs, 188 Mich., 127.

In fact the proposition and the ordinance were debated from every angle by the organs of public opinion and from scores of platforms. The points now made were made before election and the voters had before them all views of the matter. (See affidavit of Mr. Couzens, attached, pp. 35-36), and they voted nearly two to one for the proposition.

For these reasons, then, we respectfully urge the Court to CONFIRM JUDGE TUTTLE'S DECREE without further argument.

III

POINTS IN SUPPORT OF THE MOTION TO
ADVANCE.

If the Court shall deny both of the foregoing motions, we respectfully pray the Court to set an early date for the hearing.

It appears that both sides to the controversy agree that an early disposition of the case is urgent.

The City's transportation problem is exigent. The citizens have agreed upon a plan for the solution of the problem, but their "old friend," the D. U. R., knows that they do not know what they want, and has started six suits to block their plan. D. U. R. representatives threatened the citizens before election with this litigation, if they had the hardihood to vote for the municipal lines, but they did so vote. The plaintiff apparently relied upon the pendency of this particular suit to discredit the bonds and render them unsaleable in the bond markets, but when plaintiff found that the bonds were actually selling to the public, in spite of all the various suits, plaintiff's representatives hurry and anticipate our motion to advance.

The City has entered upon this work as ordered by the people. Many miles of streets have been torn up, concrete laid and other work done. Contracts have been let, general manager engaged, rails and ties are being placed on the ground, one and one-half millions of bonds have been sold.

But there are thirteen other millions to be sold, and many bond buyers are timid and the pendency of this litigation does retard appreciably and does cost the City large sums in interest and the like. With this great public undertaking pending and the work proceeding and vast obligations being incurred day by day on the faith of the validity of this ordinance and election, it is of vital importance that the chief litigation about it be brought to an end speedily.

The reasons for advancing the cause seem so pressing and clear that we need not dwell further upon the subject.

Clarence E. Wilcox,
Alfred Lucking,
Counsel for Appellee.

**SHOWING FOR THE APPELLEE IN RESPECT
TO THE MOTION OF PLAINTIFF-APPELLANT TO
ADVANCE THE CAUSE OR TO GRANT AN IN-
JUNCTION:**

If the Court shall deny our motion to dismiss the appeal and also deny our motion to affirm, we then concur in asking the Court to advance the hearing.

If, for any reason, this also should be denied, we vigorously object to and protest against any stay or injunction being issued as asked by the plaintiff.

(We submit the affidavits of Messrs. Consens and Goodwin, attached hereto, in opposition to said motion.)

The work of building this railway is going on. It is a work of the Government, approved by a vast majority of the electorate. The grounds of opposition are technical to the last degree, and there is no real showing of any harm to plaintiff's rights. Its objections are fanciful and artificial and the Courts will not allow any of plaintiff's *rights* to be impaired or taken away, even if there were the slightest disposition to do so which there is not. (See the affidavits of Messrs. Couzens and Goodwin hereto attached.)

The expenditures are now being made upon a large mileage on new streets not touched by plaintiff's lines, and it will be some considerable time before the need for possession of Fort Street and Woodward Avenue. When that time comes the City must apply for a writ of assistance to the Court under the Fort Street decree (record page 43), whereupon any and all of plaintiff's rights will be protected. In the meantime the suit in the State Court to declare the rights of the parties in Woodward Avenue, is pending in the Supreme Court of Michigan.

No harm can come to plaintiff's interests by leaving things just as they are, while great damage to defendant City and its interests would arise from an injunction.

Clarence E. Wilcox,
Alfred Lucking,
Counsel for Appellee.

Affidavit of James Couzens
IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

DETROIT UNITED RAILWAY,
 Plaintiff in Error,

vs.

CITY OF DETROIT,
 a municipal corporation,

JAMES COUZENS, Mayor,

WM. P. BRADLEY,

FRED W. CASTATOR,

JOHN C. KBONK,

SHERMAN LITTLEFIELD,

JOHN C. LODGE,

JOHN C. NAGEL,

DAVID W. SIMONS and

JAMES VERNOR,

Members of the Common Council,
 Defendants.

October Term 1920

No. 492.

Eastern District of Michigan, ss.

JAMES COUZENS, of the City of Detroit, County of Wayne and State of Michigan, being duly sworn, deposes and says that he is Mayor of the City of Detroit and one of the defendants in this case; that he was formerly a member of and president of the Board of Street Railway Commissioners of the City of Detroit and is familiar with the matters herein referred to.

Deponent states that following the decision in the Fort Street Decree affirming the right of the city of Detroit to require the Detroit United Railway to vacate

the streets and public places occupied by the Fort Street system of plaintiff upon notice from the City of Detroit so to do, (229 U. S. 39), a policy was inaugurated between the City of Detroit and the Detroit United Railway under so-called Day-to-Day agreements by which temporary permission was granted to the Detroit United Railway to construct street railway tracks upon certain streets designated in said day-to-day agreements referred to in the Bill of Complaint herein; that each of said agreements contained the following provisions:

"BE IT, FURTHER UNDERSTOOD AND AGREED between the said City of Detroit and Common Council and said Railway Company that the making of this grant and the acceptance thereof by the said company shall not be deemed a waiver of any of the rights of the City of Detroit or of the Detroit United Railway with respect to the construction, maintenance and operation of said lines of railway or street railway tracks now owned, maintained and operated in said City and each party hereto saves and reserves all its rights whatever they may be the same as though this grant had not been made and accepted."

"BE IT FURTHER RESOLVED that it is further understood that the said Detroit United Railway by its acceptance hereof gains no term rights in said street or avenue by reason of the installation of the equipment herein permitted and the Common Council or the people of the City of Detroit at their pleasure or caprice may revoke the permit hereby granted and said company will forthwith remove from the streets the property permitted to be placed therein by it under this grant."

Deponent further states that in the day-to-day agreement of August 7, 1913, referred to in the Bill of Complaint herein, it was provided as follows:

"7. It is further understood that no existing rights of either the City of Detroit or the Detroit United Railway shall be impaired or affected in any wise by this temporary agreement except as herein explicitly stated and that it is a day-to-day agreement only."

"And further, be it resolved, that while this resolution shall be in force, the enforcement of the decree in the case of City of Detroit against Detroit United Railway, No. 37,446, in the Circuit Court for the County of Wayne, in Chancery, known as the Fort Street Rental Case shall be suspended and immediately after repealing of this resolution the present existing status as to such decree shall be restored, and the city may at once enforce the terms of said decree, the same as if this resolution were not passed, and when this resolution takes effect, an order shall simultaneously be entered in said cause by consent of parties to the above effect."

Deponent further states that at the election of April 5th, 1920, the Street Railway proposition received the following vote:

Yes.....	88,585
No.....	50,776
<hr/>	
Total.....	139,776

AVERAGE IN FAVOR, 63.6%

Deponent further states that no resolution or proceeding has been passed by the Common Council of the City of Detroit modifying or changing the status as herein outlined.

Deponent further states that he is a member of the Board of Sinking Fund Commissioners of the City of Detroit and that the following sales have been made of public utility bonds of the \$15,000,000.00 authorized by the electors on April 5th, 1920:

April 20th, 1920.....	\$ 100,000.00.....
June 15th, 1920.....	200,000.00.....
August 10th, 1920.....	700,000.00.....
August 10th, 1920.....	750,000.00.....
.....City Treasurer	
.....Sinking Fund Commission	
.....Sinking Fund Commission	
.....Sinking Fund Commission	
Total.....	\$1,750,000.00

and that of said \$1,750,000.00 so sold, bonds in the total sum of \$1,564,100.00 have been resold to the public.

Deponent further avers that the following suits have been instituted by the parties and for the purposes indicated and have been disposed of as hereinafter shown:

1. April 10, 1920. *Detroit United Railway vs. City of Detroit, et al.*, in the United States District Court for Eastern District of Michigan, In Equity. Suit to restrain any proceedings or sale of bonds under said election of April 5, 1920. Suit dismissed

on motion of defendants for lack of equity. Appeal taken to this Court. (Present suit.)

2. April 10, 1920. *New York Trust Co. vs. City of Detroit, et al.*, in the United States District Court for Eastern District of Michigan, In Equity. Suit to restrain any proceedings or sale of bonds under said election of April 5, 1920, on same grounds as present suit. Plaintiff mortgagee of property in Fort Street System. Suit dismissed on motion of defendants for lack of equity.

3. April 30th, 1920. *Ellworth J. Burdick vs. City of Detroit*. Quo warranto in Wayne Circuit Court to have election of April 5th, 1920, set aside on grounds that the ballots used were on thin paper and that the printing of the spaces where the voters choice was indicated could result in exposure of ballot. (Pending.) Plaintiff is Assistant General Manager of Detroit United Railway.

4. May 10th, 1920. *Detroit United Railway, et al., vs City of Detroit, et al.*, in United States District Court, Eastern District of Michigan to have purchase of \$100,000.00 Public Utility Bonds and \$200,000.00, purchase of Public Utility Bonds restrained on the ground that the Sinking Fund Commission had no power to purchase same; also to restrain construction of tracks by City on Harper Avenue. (Pending.)

5. May 12th, 1920. *Detroit United Railway vs. City of Detroit, et al.*, in Wayne Circuit Court, In Chancery, to restrain purchase of \$100,000.00 Public Utility Bonds by City Treasurer on the ground that the Treasurer had no power to purchase; to restrain construction work under Charlevoix Avenue contract and to have election

declared void. Bill dismissed after full hearing, as without merit.

6. August 11th, 1920. *Detroit United Railway vs. City of Detroit, et al.*, in Wayne Circuit Court to have election of April 5th, 1920, declared void; all contracts made for construction work declared void; bond sales of \$100,000.00, \$200,000.00, \$700,000.00 and \$750,000.00 to Board of Sinking Fund Commissioners declared void because said Commissioners had no power to purchase same, and to restrain the City from reselling said bonds or using proceeds therefrom and to restrain contractors from working. Case dismissed on merits after full hearing. (Appeal pending to Michigan Supreme Court.)

7. September 9th, 1920. Suit by residents of *Clairmount Avenue vs. City of Detroit, et al.*, in Wayne Circuit Court to restrain construction of lines on Clairmount Avenue because a residential street; to have vote of April 5th, 1920, declared void; to have bond sales of \$1,750,000.00 declared void and to restrain City from use of proceeds. Two weeks trial concluded. (Decision pending). Mr. Bernard F. Weadock, formerly of the Detroit United Railway legal staff, appears as attorney for plaintiff.

8. September 11th, 1920. Suit by residents of *Eliot Avenue vs. City of Detroit, et al.*, Wayne Circuit Court to have lines on Eliot Avenue enjoined on similar grounds. (Pending.) Donnelly, Hally, Lyster and Munro (Attorneys for the Detroit United Railway, appear as attorneys for plaintiff.

Deponent further avers that no injunction or restraining orders have been issued in any of said cases.

Deponent further avers that all of said suits are trivial in character and a part of a series of vexatious law-suits which plaintiff publicly stated they would harass and embarrass the public authorities with if municipal ownership and operation was attempted and that such suits would result in the City being unable to sell its bonds or obtain contracts for construction of said system.

Deponent further avers that the Detroit United Railway has been for many years last past and is now paying quarterly dividends of 2% (8% per annum), and that, in addition to said dividends, its profits from the operation of its lines in the City of Detroit have been sufficient to practically construct and acquire an interurban system of great value as well as lines constructed under day-to-day agreements and the creation of a large surplus; that the officials of the City of Detroit have not pursued a destructive policy to said Company, but in spite of the very poor service rendered the public has suffered the Company to charge the following rates of fare contrary to the rights of the Company. (1) The abrogation of the 7 tickets for 25c in 1917 and the collection of a straight 5c fare. (2) In 1919 an increase from 8 tickets for 25c on franchise lines to a straight 5c fare. (3) The creation of a board of arbitration in 1919 to decide what, if any, additional increase in fares the company might be equitably entitled to, followed by the refusal of the Company to submit to arbitration upon the completion of the audit of the Company's finances. (4) In June, 1920, an increase in its fare from 5c to 6c or 9 tickets for 50c, all of which changes were made under such circumstances as not to prejudice the rights of the City or to give term rights to the plaintiff.

Deponent further avers that between January 27th, 1920 (the date the municipal ownership ordinance was passed) and April 5th, 1920 (the date of the election), the question of the adoption or rejection of said proposition of municipal ownership was very fully presented to the electorate in approximately 350 debates and public addresses to thousands of voters by both sides of the controversy; that a brief summary of the publicity in newspaper editorials and articles is as follows:

In four English daily newspapers the editorial and news items totalled 150 full pages of reading matter.

In thirty neighborhood and class publications same totalled 90 full pages.

In fraternal and club periodicals same totalled 60 full pages.

TOTAL. These, with miscellaneous matters, totaled 536 full pages of editorial and advertising comment upon the municipal ordinance from January 27th, 1920, to April 5th, 1920, both for and against the plan.

The municipal ordinance was discussed in the Electric Railway Service (published by the Detroit United Railway) weekly with an estimated circulation of 200,000 copies weekly.

More than 26 pieces of literature, each representing many pages and discussing every phase of the plan (both for and against it) were circulated throughout the city by mail, door-to-door and on the streets.

Every other known method of appeal, including button, vaudeville quartettes and general advertising was indulged in by the opponents of the plan.

Motion picture films of plan by both opponents

and proponets in all motion picture houses with an estimated attendance of 350,000 persons.

Detroit United Railway inserted 152 columns of paid advertising in English daily newspapers.

Citizens' Anti-Municipal Ownership Committee inserted 301 columns of paid advertising in the English dailies.

In weekly and neighborhood publications the Detroit United Railway and Citizens' Committee published 180 full pages of paid advertising.

Deponent further states that plaintiff caused to be published during the campaign the following information relative to the proposed plan and that the substance of the legal opinion therein expressed was widely quoted in the advertising plan against said plan for several weeks prior to April 5th, 1920:

CAR PLAN VOID 3 LAWYERS SAY.

**Failure to Include Contract for Purchase Declared
to Violate Charter.**

**Henry C. Walters and Former Judges Angell and
Hally Concur in Opinion.**

Three of Detroit's best known attorneys concurred Thursday in the opinion that the Couzens' plan ordinance violates the charter in purporting to provide for the purchase of certain D. U. R. lines when no contract for the purchase is submitted as part of the measure.

The three attorneys who expressed this opinion are Henry C. Walters, President of the Detroit Bar association; Former Judge Alexis C. Angell, and Former Judge P. J. M. Hally.

Ordinance Held Lacking.

Mr. Hally, when asked what effect the clause requiring the approval of three-fifths of the electors would have on the ordinance replied:

"The ordinance to be submitted to the electors April 5 does not provide for the condemnation or purchase of any part of the existing street railway. Before the city can condemn or purchase all or any part of the existing street railway the people must approve of the condemnation or purchase proposition, as provided in Sections 7 and 8 of Chapter 13 of the charter.

"This ordinance proposes to have as part of the municipal plan certain of the lines constructed under the 'day-to-day' agreement. There is, however, nothing in the ordinance authorizing a purchase of from any other mentioned in it, and there is nothing in the ordinance to distinguish these lines, nor is there anything in the ordinance from which the terms of purchase can be inferred—a proposition would necessarily include the terms of sale. These are the things on which the people must pass to make the sale valid.

Purchase Not Provided For.

"Every day-to-day agreement contains the following language: 'If the city of Detroit shall be lawfully authorized to engage in the ownership and operation of street railways, and shall desire to operate part of its system over this street, it shall purchase the tracks and the equipment constructed under this consent.' This is a contract between the railway company and the city. Now, the ordinance in question, in so far as it mentions

streets covered by the day-to-day agreement shows its desire to operate part of its system over said streets, and, in consequence, under the contract the city must purchase these properties from the railway company. As has been pointed out, the ordinance does not provide for this.

"Now the question arises: 'Is the ordinance, in so far as it attempts to take possession of these day-to-day agreement streets, without agreeing to purchase them, a law which impairs the obligation of a contract? In so far as these streets are a necessary part of the proposed plan, is it possible to proceed at all?'

"In other words, if a necessary part of any plan which must be authorized by a popular vote is not legally provided for, can any part of the plan be carried out?"

Attorney Walters Concur.

Attorney Henry C. Walters, when asked if, in his opinion, the section of the charter providing for approval by a three-fifths vote of any proposition to purchase or lease existing street railway property did not operate in carrying out the Couzens plan, replied:

"Yes, I think it would, so far as the purchase phase of the plan is concerned, because the section referred to clearly provides that an actual contract, or tentative contract, to purchase must be submitted to and have the approval of three-fifths of the electors voting on it at any regular or special election."

Former Judge Angell, after reading the ordinance and the charter provisions governing the street railway commission, said he agreed with Mr. Walters and Mr. Hally.

"In its present form the ordinance makes no distinction between the lines to be constructed and those to be acquired," Mr. Angell said.

Charter Provision Plain.

"The charter expressly provides how each line of procedure shall be carried out, and it is very clear that any plan to purchase must include a contract between the city and the railway company, in which the terms of the purchase are set forth, for it is clear that the charter intends that these terms shall be approved by the three-fifths majority to be binding.

"If the ordinance had been drawn with this in mind the lines to be built would have been separated from those to be purchased, and the terms of purchase of the latter would have been set forth."

According to the ordinance the lines which would be taken over if the ordinance was approved and found operative would be approximately half of what are called the "Class A" lines; that is, the nucleus of the municipal system.

If the ordinance does not cover the purchasing of these lines, the mayor's system will be deprived of its most essential routes, which would leave the 100 miles of new track, if built, merely a series of stub-ends and short sections of track impossible of operation as a system.

Deponent further avers that on August 9th, 1918, the Common Council of the City of Detroit adopted a resolu-

tion terminating the right of the Detroit United Railway to occupy any streets where their franchises had expired or of operating their cars thereon and instructing the Legal Department of the City to institute ouster proceedings in the Wayne Circuit Court for the purpose of securing a decree of ouster in accordance with the decision in the Fort Street Decree; that the streets so designated were Woodward Avenue from the Detroit River to Pallister Avenue; Michigan Avenue; Grand River Avenue; Gratiot Avenue; Congress and Baker Streets; Cass Avenue and Third Avenue; Trumbull Avenue; Atwater Street; Brush and Russell Streets; Chene Street; Jefferson Avenue and Mack Avenue; that said suit was filed by the City of Detroit against the Detroit United Railway on August 27th, 1918, and answer filed admitting the expiration of the franchises; subsequently on or about June 1st, 1920, defendant made a motion to dismiss said suit on the ground that (1) the Council was without power under the Charter to exercise control over the use of the streets of the City; (2) that authority to institute said suit should have been by ordinance instead of by resolution; (3) that the resolution if valid, was repealed by the passage of the Kronk Ordinance. Deponent further avers that said motion to dismiss was denied by the Court from which order defendant has appealed to the Michigan Supreme Court.

Deponent further avers that the City of Detroit is now actually engaged in the construction and the purchasing of all supplies and equipment required for thirty miles of street railway tracks urgently needed and that the plaintiff in the last ten years has not constructed within the City of Detroit in excess of fifty miles of single

tracks, whereas the City needs and has needed for years nearly two hundred miles of additional trackage.

FURTHER DEPONENT SAYETH NOT.

James Cousens.

*Subscribed and sworn to before me this 14th
day of October, A. D., 1920.*

J. R. Walsh,

Notary Public, Wayne County, Michigan.

My commission expires July 10, 1921.

Affidavit of Joseph Goodwin
IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

DETROIT UNITED RAILWAY,
Plaintiff in Error,

vs.

CITY OF DETROIT,

a municipal corporation,

JAMES COUZENS, Mayor,

WM. P. BRADLEY,

FRED W. CASTATOR,

JOHN C. KRONK,

SHERMAN LITTLEFIELD,

JOHN C. LODGE,

JOHN C. NAGEL,

DAVID W. SIMONS and

JAMES VERNOR,

Members of the Common Council,

Defendants.

October Term 1920.

No. 492.

Eastern District of Michigan. ss.

JOSEPH S. GOODWIN, being duly sworn, deposes and says that he is a resident of the City of Detroit, County of Wayne, State of Michigan, and that he is General Manager of the Municipal Street Railway System of the City of Detroit.

Deponent avers that since the municipal street railway election of April 5th, 1920, the City of Detroit by and through its Board of Street Railway Commissioners has duly entered into the following contracts for street rail-

way construction and that the status of construction work on each contract is as indicated, to-wit:

(1). *May 12th, 1920.* Contract with J. A. Mercier for excavation and concrete foundation work for double track on Charlevoix Avenue east of Connors' Road. Contract completed. 3233 feet of double track laid. Tracks surfaced.

Length: 1.3 Miles Double tracks.

Contract price, \$51,446.40.

(2). *July 6th, 1920.* Contract with Thomas E. Currie for excavation and concrete foundation for double track on Charlevoix Avenue, between Connors Avenue and Detroit Terminal. Work completed except small sections at Connors' Creek Bridge and Detroit Terminal crossing. Tracks laid. Paving in progress.

Length: 0.31 mile double tracks.

Contract price, \$14,653.40.

(3) *July 6th, 1920.* Contract with Lennane Bros. for excavation and concrete foundation on Harper Avenue south track between Van Dyke and Gratiot Junction. Completed. Ties and rails are now laid and pavement completed.

Length: 0.74 Miles single track.

Contract price, \$19,268.00.

(4) *July 19th, 1920.* Contract with J. A. Mercier for double track street railway on Montclair, Shoemaker and St. Jean Avenues. Excavation and foundation practically completed. 2100 feet of double track laid.

Length: (about) $2\frac{1}{2}$ miles double tracks.

Contract price, \$164,730.00.

(5) *July 19th, 1920.* Contract with J. A. Mercier for double track street railway bed on Charlevoix-Buchanan Cross-town. 17,400 feet of

double track roadbed excavated. 10,832 feet concreted. 1,600 feet of track laid.

Double track about 8.08 miles.

Single track about 1.28 miles.

Contract price, \$605,531.00.

(6) *July* 23rd, 1920. 4150 gross ton with accessories contracted for.
STEEL RAILS

(Lorain Steel Company) Contract price, \$553,392.50.
2648 ton of rail received and unloaded; 310 tons in transit.

(7) *July* 20th, 1920. 55,000 wood ties, @ 2.74.
TIES. 1,845 received; 6,122 in transit.

Contract price, \$150,700.00.

(8) Miscellaneous contracts for steel poles (\$151,850.00).

8800 Steel ties (\$73,480.00) of which 5000 have been received, and general supplies (\$65,000.00).

(9) Six concrete mixers, \$43,731.00; four delivered, two to be delivered.

(10) 40,000 barrels of cement ordered, \$108,400.

Total Contract, \$2,002,162.85

Total payments, 457,390.74

Deponent further states that there are upward of seven miles of important streets in the City of Detroit that are now excavated by reason of said construction work and that if said work be enjoined it will be impossible to put the streets in such condition that traffic could use same; that the building season ordinarily stops on or about November 15th, due to cold weather conditions, and it is the expectation of the Street Railway Commission to complete the excavation and concrete foundation work and installation of ties and rails therein so as

to have said streets completed by said date; that said contracts for construction and supplies are sufficient to provide a street railway system of approximately 30 single track miles as the original unit of the system voted for April 5th, 1920.

J. S. Goodwin,
*SUBSCRIBED and SWORN to before me this 15th
day of October A. D., 1920.*

J. R. Walsh,
Notary Public, Wayne County, Michigan.

My commission expires July 10, 1920.

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IN THE

Supreme Court of the United States

DETROIT UNITED RAILWAY, Plaintiff and Appellant, vs. CITY OF DETROIT, et al., Defendants.	}
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October Term, 1900.
No. 492.

**BRIEF FOR DEFENDANT ON FINAL HEARING,
AND ALSO ON MOTION TO DISMISS.**

The defendant, City of Detroit, moved, at the opening of this term, to dismiss or affirm or advance and this Court granted the motion to advance and reserved until the hearing of the case the motion to dismiss. We now urge the dismissal of the case and in default thereof the affirmance of decree below.

Some of the grounds to be urged are applicable alike to the question of jurisdiction and to the merits; we shall endeavor to repeat the arguments as little as possible.

This suit is one of a series of vexatious suits brought by the plaintiff to prevent the City of Detroit from carrying out the expressed will of a vast majority of its citizens at an election held April 5th last, wherein the people approved the proposition, to acquire its own street rail-

way lines upon certain specified streets of the town; and to issue \$15,000,000 of bonds for that purpose.

The pretended ground of federal jurisdiction is that city officials propose to compel plaintiff to sell its rails and equipment on two streets in Detroit (Fort Street and Woodward Avenue) at an inadequate price, but the real object of the suit is to set aside the election and thwart the city in its efforts to acquire adequate transportation facilities. The alleged ground of jurisdiction is so thin as to be transparently gauzy and the other grounds of complaint alleged, are equally, we think, without any foundation in justice or in law.

STATEMENT OF THE FACTS.

Detroit had more than doubled in population within the previous ten years and the utter inability of the plaintiff company to cope with the existing situation became so apparent and the inconveniences of citizens so great, that the city administration, headed by Mr. James Couzens, as Mayor, submitted a proposal to the electors on April 5th, as is required by the Constitution and the law, to authorize the city to acquire a municipal system on certain streets and to issue \$15,000,000 in bonds for the purpose. The proposed system in the main covered certain new streets and also two streets (Fort Street and Woodward Avenue) where the plaintiff company had long operated, but on which its franchises had expired, and also some streets on which the defendant company had in recent years constructed street railways under what are known as "Day to Day agreements," with stipulations to sell to the city at an arbitrated price.

After an extended discussion, participated in by all the newspapers and scores of public speakers, in which every

phase of the proposition was debated, the proposal was carried by a vote of 89,285 to 51,093.

No sooner was the vote announced than this bill, together with a number of others, in the State courts, was filed by the Railway Company, to block the work. This suit, like the others, is based upon the flimsiest of technicalities, designed to thwart the mature judgment of the people and their administration in acquiring new facilities which are absolutely essential to the prosperity and growth of the town.

In 1910 the franchise of plaintiff expired on the chief trunk lines, and, notwithstanding the plain language, plaintiff, in defiance of the express written word, claimed to have perpetual franchises on those streets. Fort Street was made a test case, and the Supreme Court of Michigan held (and this was confirmed by the Supreme Court of the United States) that plaintiff's franchise having expired, it had no further rights upon the streets and that it must vacate upon notice of ninety days, given by the City Council (see Decree, R. p. 43).

City of Detroit vs. D. U. R., 172 Mich. 136.

D. U. R. vs. Detroit, 229 U. S. 39.

This decree was made February 28, 1913, and affirmed by the Supreme Court of the United States May 26, 1913.

The Fort Street Decisions.

In that case the Supreme Court of Michigan held:

(1) That there was no implied obligation after the termination of a franchise to permit the railway or to require the railway to continue the operation of the rail-

way upon reasonable terms, even though the requirements of the public required the same.

(2) Upon the expiration of the term of franchise, the rights of railway company terminate unless extended by mutual arrangement.

(3) The construction of a franchise where susceptible to two interpretations is always in favor of the municipality.

(4) No estoppel arises against a municipality because of inaction on the part of its officials.

(5) Upon the expiration of the franchise the railway company became a trespasser in the streets and the city could compel it on reasonable notice to remove its property.

In that case the railway company argued that it had a duty to the public to continue operation and on the other hand a right to continue to operate so long as public necessity or convenience required. On this subject the Court said:

"This argument seems to be based upon the assumed necessity of the continued use of the tracks of defendant for the comfort and prosperity of the public. It is evident that the municipal authorities are duly constituted as representing the people of the city, and it is the only government agency provided, as municipalities are now constituted, for conserving the interests of the public. For the purpose of carrying out these views of defendant no method is formulated, and there does not appear to be any which the Court may utilize unless the idea of perpetuity is accepted. The constitutional agency provided to conserve the interests of the public has in this case expressed what may be considered the desire

of the public relative to its interests. We think that in advancing this argument the fact is overlooked that constitutionally enacted statutes and ordinances have provided when the terms of these franchises expire, and also determined the contractual relations which were created by the acceptance of franchises lawfully granted. Taking, as we do, this view of the situation, we do not recognize the existence of the implied obligation claimed" (p. 149).

In the same case on appeal the Supreme Court of the United States affirmed the decision of the Supreme Court of Michigan, and among other things held:

(1) That franchises to street railways in streets must be in plain language, certain and definite in terms and contain no ambiguities. They are to be strictly construed against the grantee.

(2) That there was no force in the claim of an implied contract to permit the railway to remain in the streets after the expiration of franchise. Under such reasonable arrangements for public service as the situation might require,

"the right to grant the use of the streets was in the city. It had exercised it, had fixed by agreement with the railway the definite period at which such rights should end. At their expiration the rights terminated. The railway took the several grants with knowledge of their duration * * * The rights of the parties were thus fixed and cannot be enlarged by implication. A street railroad is authorized to operate for a definite time and has enjoyed the full term granted, it may, upon failure to renew the grant, be required within a reasonable time to remove its property from the streets."

The Fort Street Case Decree:

The decree of the Supreme Court of Michigan in the Fort Street case (R. p. 42), as affirmed by the Supreme Court of the United States, declared that the franchise had expired and that:

"All contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets (describing the Fort Street line fully) expired by limitation June 30, 1910, and that the Detroit United Railway has no rights or privileges upon any of the said streets
* * *."

Then it declared that the railway having refused to comply with the terms proposed by the Common Council, "is without any rights in or to said streets and it has been and is a trespasser in continuing to occupy them and operate cars thereon."

It then provided the Common Council might require the railway to cease the operation of its cars and by resolution required the removal of the property from the streets, and

"such removal shall be effected by said railway company within ninety days after notice of said resolution,"

unless time extended by Common Council. And it further decreed in case the railway company failed to comply with said resolutions

"then the Circuit Court for the County of Wayne in Chancery to which the case is remanded, upon its application of the city shall forthwith issue its peremptory writ of injunction to enforce the cessation of operation and if the defendant shall not

remove all of its property from said streets within the time allowed then the Circuit Court in Chancery, upon like application shall forthwith issue its writ of assistance to compel and effect the removal of the railway's property from said street" (R. pp. 42, 43).

The right of the city to order the railway's property off the streets was reaffirmed in the Kronk Ordinance case, so-called.

D. U. R. vs. Detroit, 248 U. S. 429.

The Constitutional Provision:

Throughout the present case it becomes vital to know that prior to the expiration of these franchises and in the year 1908, the people of the State of Michigan adopted a new Constitution, after prolonged deliberations of a representative convention consisting of many of the best minds of the State. For years controversies had existed relative to the rights of railways in the streets both before and after the expiration of franchises. The new Constitution made provision on that subject as follows:

"Nor shall any city or village * * * grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city * * *."

Article 8, Section 25, Constitution of 1908.

Every fact entering into the consideration of this case, every step taken, has been made in full view of this Constitutional provision.

Day to Day Arrangements:

Following the two decisions in the above mentioned case, the Common Council of Detroit and the railway company, complying with the above Constitutional provision, made "A Day to Day" arrangement, fixing the fares, revocable at the will of either party (R. pp. 44-46).

The parties being well aware of the lack of power of the council or officials to grant any term rights whatsoever, entered into a revocable day to day agreement; and such has been the practice in Detroit on all streets where any new work has been done since 1910 (R. pp. 23-26).

Every dollar expended by the railway company in new rails or new construction, out of its unceasing flow of revenues from these streets, has been made with the utmost deliberation under this Constitutional provision, and under the most solemn agreements capable of being formulated and agreed to by competent parties, that it would claim no rights in the streets by virtue of such new works (see the Agreements, pp. 44-46, 23-26).

The Plan in Question:

The great growth of Detroit rendered more mileage imperative and the railway company protested it could not get the money—at any rate, it did not give the service; hence the city administration formulated the plan in question and obtained from the people the needed approval and money.

Notwithstanding every obstacle plaintiff has thrown in the way, the city's progress with this plan has been

steady and marked, and many miles of work on the new lines have been laid.

Bill of Complaint:

The Bill of Complaint is very long, verbose and argumentative, even abusive of the city and its officials. Its great length and involved, obscure allegations are such that in view of the different rulings of this Court that the bill should state facts and not evidence or arguments, and that grounds of jurisdiction should be alleged plainly and in clear and simple language, we submit the case ought to be dismissed for violation of these rules.

The bill in substance alleges three grounds for relief:

(1st) That the election was void because the voters were misled and the proposition improperly submitted.

(2nd) That plaintiff has gained continuing rights in Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case, which rights the officials threaten to disregard.

(3rd) That the city officials were intending, acting under the ordinance and election, in bad faith to threaten to throw plaintiff's property off Fort Street and Woodward Avenue, with the real intent of not doing so but of compelling plaintiff to sell its property in those streets at an inadequate price. (This last is the sole alleged ground of Federal jurisdiction.)

Motion to Dismiss:

The defendant moved in the court below to dismiss the bill on two grounds:

(1st) That no Federal question was shown to give the Court jurisdiction, and

(2nd) That there was no equity in the bill which entitled plaintiff to relief.

After argument, Judge Tuttle held that he would take jurisdiction of the case, not because any Federal question was really involved, but because plaintiff made a claim of one, apparently in good faith. The learned Judge then proceeded in an oral opinion of great clearness to point out that there was no equity in the bill on its face (R. pp. 57-60).

Pre-Existing Power to Remove.

The City of Detroit and its officials had full power to acquire and operate street railways before the ordinance or vote in question in this case.

The following enactments (Constitutional, State legislative, city charter and ordinances) fully provide for this, and the city was not dependent in any way upon the ordinance or vote in question in that behalf.

The Constitution adopted in 1908 authorized municipal ownership.

Article VIII, Section 23, provides:

"Subject to provisions of this Constitution, any city or village may acquire, own and operate
 * * * public utilities for supplying * * *
 transportation to the municipality and the inhabitants thereof * * *."

Section 25 provides:

"No city or village shall have power to abridge the right of elective franchise * * * nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors * * *."

Pursuant to the above Constitutional provisions, the State Legislature passed enabling legislation which has been from time to time upheld by the Supreme Court of Michigan.

The first Home Rule Act, under this constitutional provision, Act 279 of the Public Acts, was approved June 2, 1909 and Sections 4 and 5 of this Act specifically authorize the amendments of city charters to provide for municipal ownership of transportation utilities.

The Verdier Act, so-called, being Act No. 5 of the Public Acts of 1913, was approved March 11, 1913, and it authorized cities to make so-called piecemeal amendments of their respective charters, for this purpose, without a revision of the entire charter. The constitutionality of this legislation was sustained in:

Atty. General vs. Lindsay, 178 Mich. 524, 527.

The City Charter:

Immediately following this legislation, proceedings were taken to amend the charter of Detroit to provide for municipal ownership. On April 7, 1913, four several charter amendments were carried by large majorities,

giving Detroit the power and right to acquire such facilities. See the history of this in:

Atty. General vs. Lindsay, 178 Mich. at pp. 538, 544, 545.

These charter amendments gave full power on this subject to the city. Section 1 provided:

"The City of Detroit shall at once proceed to and as soon as practicable acquire, construct, own and operate a street railway system upon and above the surface of the streets of the City of Detroit * * *."

Sections 2, 3, 4 and 5 provide for the creation of the Board of Street Railway Commissioners, its organization and its powers.

Section 6 provided:

"It shall be the duty of said Board to proceed promptly to purchase, acquire or construct and to operate street railways in and for Detroit, and as soon as practicable to make said system exclusive * * *."

Section 7 said:

"The Board may purchase or lease or by appropriate proceedings prescribed by law, condemn all or any part of the existing street railway property in the City of Detroit * * *."

Section 8 said:

"Any contract to purchase or lease herein contemplated or any plan to condemn existing street railway property, shall be void unless approved by three-fifths of the electors * * *."

Section 9:

"The Common Council of the City of Detroit shall on request of said Board issue bonds of the City of Detroit, to be known as general bonds, to the amount of two per cent of the assessed value of the real and personal property of the city."

The new City Charter adopted by the people June 25, 1918, contains substantially the same provisions as the original charter of 1913 above quoted. A copy of this is printed as an appendix hereto, post p.

Act No. 119 of the Legislative Acts of Michigan of 1919 adopted a carefully drawn condemnation statute in which Section 1 provided as follows:

"Any city in this State having a population of 25,000 or more is hereby authorized to take for public use the absolute title in fee to any public utility for supplying * * * transportation to the municipality and inhabitants thereof * * *."

The Seven for a Quarter Arrangement:

Following the decisions in Fort Street case, above stated, and in line with those decisions and the constitutional provision above quoted, a day to day arrangement for operation was made between the common council and the railway company, fixing fares, which was revocable at the will of either party. It consisted of the letter from the president of the railway company to the mayor and common council, dated August 5th, 1913, stating the proposed terms, which were accepted by resolution of the common council and approved by the mayor. This provided for a fare of seven tickets for twenty-five cents, a single cash fare to be five cents and for certain

workingmen's tickets; and the proposal from the railway over the hand of its president ended with the following provision:

"It is further understood that no existing rights of either the City of Detroit or the Detroit United Railway shall be impaired or affected in any wise by this temporary arrangement, except as herein explicitly stated, and that it is a Day to Day Arrangement only."

The resolution provided for acceptance and:

"Be It Further Resolved, That while this resolution shall be in force, the enforcement of the decree in the case of *Detroit vs. Detroit United Railway* (describing it) shall be suspended and immediately after repeal of this resolution the present existing status as to such decree shall be restored and the city may at once enforce the terms of said decree, the same as if this resolution were not passed * * *.

And Be It Further Resolved, That this resolution may be repealed at any time by the Common Council." (R. pp. 44-46.)

The expenditures alleged in the Bill of Complaint, on Fort Street and Woodward Avenue, as also the enormous revenues derived by the railway from those streets, were made and received under the terms of the above described arrangement, and in deliberate contemplation by the railway of the decisions and decree of the Fort Street rental case and the constitutional provision above cited.

ARGUMENT.

Question of Jurisdiction:

This defendant has insisted from the outset of this case that no Federal question was raised or involved by the Bill of Complaint and hence that the Federal courts are without jurisdiction. This the defendant still contends and it now urges that the District Court from the beginning was without jurisdiction and it prays this Court to enter the appropriate order or decree.

The Federal Question Must Be Real and Substantial:

The judge below, in his logical and illuminating opinion, which was delivered orally at the conclusion of the arguments, said:

"As I view it, the most difficult question is the one as to whether or not a Federal Constitutional question is involved. In the light of the recent decisions, I reached the conclusion that it is my duty to take jurisdiction of the case, but I do so on the theory that the Federal question is raised in good faith, and not because when such question is properly answered the bills show any invasion of constitutional rights" (R. p. 57).

The learned Judge gave plaintiff credit for good faith in starting this suit although he promptly decided every question raised by plaintiff's counsel adversely.

We submit the Court was too generous—there could be no good faith (belief in the ground for Federal jurisdic-

tion) without at least a plausible ground for it. We argue that good faith is not enough to give jurisdiction but there must be a really substantial question about which open minds could differ.

And so are the authorities:

Newburyport Co. vs. Newburyport, 193 U. S. 561, 576, 579.

Harris vs. Rosenberger, 145 Fed. 449, 452.

Underground R. R. vs. New York, 193 U. S. 416.

1st U. S. Compiled Stat. 16, Sec. 1019 (Jud. Code, Sec. 37).

In the *Newburyport* case, *supra*, Chief Justice White said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial but is without color of merit" (citing cases, p. 576).

And again:

"Concluding for the foregoing reasons that the rights asserted in the bill under the Constitution upon which the jurisdiction of this Court depends, and upon which also the jurisdiction of the lower Court depended, were so attenuated and unsubstantial as to be devoid of merit, our duty is to direct that the decree of the Circuit Court be reversed at appellant's costs, and that the case be remanded to that court with instructions to dismiss the bill for want of jurisdiction" (p. 579).

And in *Harris vs. Rosenberg*, *supra*, VanDevanter, Circuit Judge, said upon this question of jurisdiction of the Federal courts:

"The claim must be real and substantial, not merely colorable or without reasonable foundation"

He also spoke in that case words which will be found directly applicable to this case as follows:

"Whether the question of the construction or application of the Constitution is real and substantial or is merely colorable and without reasonable foundation, depends, *inter alia*, upon whether it is an open one in the Supreme Court or has been solemnly and directly determined by that court. As was said by Mr. Justice Brewer, then Circuit Judge, in *Kansas vs. Bradley*, 26 Fed. 289:

"When a proposition has once been decided by the Supreme Court it cannot longer be said that in it there still remains a Federal question. More correctly it is said that there is no such question, State or Federal."

The statute itself, *supra*, provides that if such suit does not *really and substantially* involve a controversy properly within the jurisdiction, or that parties have been joined for the purpose of creating a case cognizant in said court, the Court shall proceed no further.

The Alleged Ground for Federal Jurisdiction:

The *only* ground alleged for Federal jurisdiction is that the city officers, acting by authority of this new ordinance and election, were about to attempt to force the plaintiff to sell its property in certain streets (Fort Street and Woodward Avenue) at an inadequate price,

by threatening and pretending that the council would order plaintiff to remove from those streets and thus force the company to sell at a low price, rather than be compelled to take up the property with the attendant sacrifice. From this the inference is drawn that it was a taking, or threatened taking, without due process (R. pp. 16, 19-20; Brief for Appellant, pp. 28, 31, 32, 33).

On this subject the bill alleges (R. p. 16):

"The method of accomplishing said dishonest and unlawful purpose the said Mayor and some of his associates have many times openly and publicly stated to be (indeed, the intent and purpose to use this method is clearly indicated in the Mayor's message to the Common Council, Exhibit 5, and the sample ballot, Exhibit 6) that he will offer to plaintiff the sum of \$40,000 for each mile of track (including overhead equipment) so to be taken, which sum is—as is well known to said Mayor and his associate defendants—less than one-half of the fair value thereof, and that if such offer is not complied with, he and his associate defendants will order said tracks and equipment removed from said streets."

* * * * *

"The claimed power of so ordering the said tracks and equipment to be removed is to be exercised only as a pretense, pretext and subterfuge for the accomplishing of the said iniquitous scheme of taking said property from the plaintiff for use as a street railway in its present precise condition and in the manner in which it is now used, without paying fair and reasonable compensation therefor."

And further (R. p. 21) :

"Plaintiff further avers that it is the intent and purpose of said defendants, note particularly the Mayor's message submitting the ordinance—which purpose they have threatened to execute—to say to plaintiff, 'You must either sell your trackage at the inadequate price the city offers, or cease operating your cars thereon and tear up and remove the same from the streets.'

This in the circumstances stated in this bill is, plaintiff avers, a resort to illegal means to compel plaintiff to sell its property for an inadequate price, and to thereby deprive it of its property without due process of law in contravention of the due process of law clause of the 14th amendment of the Constitution of the United States."

Plaintiff recognizes that if the city actually *intended* to oust the company from Fort street there would be no invasion of its rights. The question of federal jurisdiction therefore depends entirely upon the occurrence of some official act less than actual ouster, namely, pretended action looking towards ouster.

No Actual Threat to Take at Less Than Fair Price:

The bill sets forth the alleged threats but an examination of them as alleged do not bear out the charge of "threats to take at less than a fair price" as will now be seen.

In a thoughtful explanatory communication (see the whole communication, R. pp. 51-53) to the Common Council, Mr. Couzens, the Mayor, said :

"The Class A system provides the taking over of 34.25 miles of line built under the so-called 'day

to day' agreements, in which the city has the right to purchase the lines at cost to the railway company, less depreciation, and which is estimated will be about \$40,000 per mile. Added to this, we propose to take over the so-called Fort Street line and the Woodward Avenue line to Milwaukee Avenue, which aggregates an additional 21.25 miles, which, it is safe to assume, the railway will be glad to deliver us in preference to getting off the street, at say, an estimated cost of \$40,000 per mile.

This aggregates a total of \$2,220,000 for lines already built. The additional new lines proposed in Classes A and B system aggregate 100.75 miles, at an estimated cost of construction of \$70,000 per mile, which totals \$7,052,500.

In addition to this, assume we purchase 400 cars equipped with motors at an estimated cost of \$10,000 per car, which would aggregate \$4,000,000 and 150 trailers, at an estimated cost of \$5,000 per trailer, aggregating \$750,000, or a total of \$4,750,000 for cars and trailers, to which we have added \$1,000,000 for car barns, tools and miscellaneous equipment.

This totals in the aggregate \$15,022,500."

On the map (R. p. 52) a "financial plan" for A.B. lines was given, containing this statement:

"Present trackage to be taken over at cost less depreciation, as specified at the time the company was given permission by the city to build under a day to day agreement: 34.25 miles estimated at \$40,000.....\$1,370,000

Fort and Woodward tracks where franchise has expired, 21.25 miles, estimated at \$40,000..... 850,000

New tracks in unserved districts, 100.75 miles, estimated at \$70,000..... 7,052,500"

The above are the threats as alleged in the bill. You will thus see that Mr. Couzens' engineers estimated the second-hand tracks and fixed equipment as worth \$40,000 per mile. New lines were estimated at \$70,000 per mile. Under the day to day agreements the city and the company agreed that the city should take over the same at cost less depreciation (R. p. 25, face of pamphlet, p. 52) and this trackage and equipment Mr. Couzens also estimated as \$40,000 per mile (R. p. 52).

This price may be too low or too high, but it was never stated, speaking as to either of the lines, to be anything but an *estimate*. Mr. Couzens estimated that under the arbitration the price of the second-hand trackage and fixed equipment would be fixed at \$40,000 per mile, because that, in his judgment, and in the judgment of the engineers, was a reasonable price; and exactly the same reasoning applied to the similar second hand trackage and fixed equipment on Fort Street and Woodward Avenue. These estimates were put forth to the public purely as estimates and as stated, they may have been too high or too low but they were only estimates.

It is thus plain that all plaintiff's alleged fears of an evil intent on the part of the City officials to take at less than fair value, are fanciful—merely imagined for the sake of jurisdiction.

It Is Lawful to Make an Offer, or Request Removal:

But if the alleged scheme were carried out precisely as claimed, (even including the violent manner described in the lurid language of the bill) it has been held to be a perfectly valid and lawful course by the Supreme court of the United States. In other words, this Court has held that the City has a perfect right to make an offer to the Railway Company of a certain price for its tracks and equipment and in default of acceptance, to ask it to remove its property and this court has held that such course is not a taking of property without due process.

Denver vs. New York Trust Company, 229 U. S. 123.

That case on this proposition seems to be identical with the case at bar and to dispose of the question of jurisdiction. There the franchise of the water company had expired and the property of the water company was appraised at \$14,000,000.00 by appraisers. The offer of the City was \$7,000,000.00 or an alternative of the City building its own plant, and thus ruining the other. With reference to this question, the Court, speaking by Mr. Justice Van Devanter said:

"The next objection invokes the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and is, that the charter amendment subjects the water company to the alternative of accepting an inadequate price for its plant or of having its value ruinously impaired by the construction and operation of a municipal plant, and that this amounts to an unlawful deprivation of property. The objection

is faulty in that it fails to recognize the real situation to which the charter amendment applies. The water company, although the undoubted owner of the physical property constituting its plant is without a franchise to maintain and operate it through the streets of the city, the prior franchise having expired; and the city not only is under no legal obligation to renew the franchise or to purchase the plant, but is free to construct and operate a plant of its own. How then, can it be said that the proposal, expressed in the amendment, to purchase the company's plant at \$7,000,000 and to devote \$1,000,000 more to its betterment, or else to construct a new one at a cost of \$8,000,000 involves an unlawful deprivation of property or any right? See *Madera Water Works vs. Madera*, 228 U. S. 454; *Detroit United Railway vs. Detroit*, ante, p. 39. Whether \$7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard for its own interests. That the City, mindful of its interests, offered \$7,000,000 for the water company's plant, when it could have proceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter. *Newburyport Water Co. vs. Newburyport*, 193 U. S. 561, 577."

So also, *Newburyport Co. vs. Newburyport*, 193 U. S. 561. In this case the plaintiff claimed that it was deprived of its property without due process, under the Fourteenth Amendment.

"The bill based this contention upon the charge that as the legislative act which gave the company the privilege to sell to the city, if it chose to do so, was coupled with the right conferred upon the city, if the company did not sell, to erect a water plant of its own, the sale by the company was compulsory, since the execution by the city of the authority to erect its own plant would have worked the ruin of the water company" (566).

The Court speaking by Chief Justice White, said among other things:

"Now it is conceded that the charter of the Water Company was not exclusive, and was subject to repeal, alteration or amendment at the will of the legislature. This being the case, it is evident that no deprivation of property without due process of law . . . did or could arise from the act empowering the city to erect its own water works. The legislature could therefore have exercised this power without compelling the city to buy the plant of the Water Company. The bill proceeds upon the theory that if this right had been exerted the company would have been ruined and the value of its property destroyed. . . . The advantage resulting from the power conferred upon the company to sell enured to its benefit since it saved it from a ruin which otherwise would have been occasioned. No compulsion in any legal sense can be said to have been exerted on the company by the option given

it, because the exercise by the company of the option, upon its own theory, saved its property from destruction" (577-79).

It would be presumptuous for us to attempt to add anything to the powerful reasoning of these two opinions on this subject.

Thus we have affirmed by two decisions of the highest court, that if the precise steps were taken which the bill says were in contemplation by the city officials, and if these steps were successful, there would be no taking of property without due process. This court having twice decided that the very steps alleged to be threatened on this case do not constitute "a taking without due process," we submit there can be no good faith allegation of a Federal question, "it cannot be longer said that in it there still remains a Federal question."

Van De Vanter J. in Harris vs. Rosenberger, 145 Fed. 452.

It would seem that this ought to dispose of the question of jurisdiction, but there are other good reasons for the same conclusion.

No Purchase of Railway's Property Without Another Vote:

All the counsel on both sides agreed in the Court below, that the ordinance as adopted by the council and the authorization as voted by the people did not in any manner authorize the acquisition of plaintiff's property in said streets (Fort Street and Woodward Avenue) and that in order to acquire such property by purchase an agreement with the Company must be entered into, a definite and specific agreement fixing the price, and

then the agreement submitted for approval to the vote of the people *at another election* (R. pp. 59, 80).

The fundamental law of Detroit, namely, its Charter, forbids the taking of any street railway property by purchase (or by condemnation,) except under a specific contract of purchase approved at an election by a three-fifths vote (R. p. 18).

The ordinance and election sought to be set aside in this case did not cover any such authorization.

All of the counsel agreed before the Court below (Rec. pp. 59-80) that none of the plaintiff's rails or other property in the streets could be taken by the city without another vote of the people, after a contract was arrived at *with the assent of the plaintiff company*.

Therefore, the pretended fear of the plaintiff that it was to be forced by this ordinance or election or either one of them, into an agreement to sell at an inadequate price, (which is the sole ground of federal jurisdiction claimed in this case) is but a figment of the brain of counsel, a figment not even dreamed by counsel, but artificially conjured up for the purpose of the case.

The Election and Ordinance Nothing to Do With Purchase of Railway's Property:

But counsel for the plaintiff say to the City: "You may (in fact you intend to) force us to a low price below the true value, by threatening to order us to vacate the streets." If that were true, the city's right to order plaintiff off the streets is given or rather confirmed by the decisions of the Supreme Courts of Michigan and of the United States above cited. But

such right does not arise out of and is not strengthened in any way by this ordinance or vote of the people. *It can only be taken by orders of Common Council under the decree of the Court, and this order by the Common Council could still be passed and the plaintiff ordered off the streets even if the ordinance and election were declared void.* This removal from Fort Street could have been commanded at any time since the decree in 1913 without any such ordinance as the one now attacked. There is no connection or relation between the election or ordinance sought to be set aside and the right to order the Company removed or the actual vote of ordering their removal.

The proposal to purchase plaintiff's lines on Fort Street and Woodward Avenue could not have been submitted in the ordinance in question because no agreement existed with the plaintiff and this is an essential preliminary.

Furthermore, the Common Council under previous legislation and the Charter provisions had full power to deal with the subject matter of and removal of the Fort Street tracks and other tracks where franchises had expired, entirely irrespective of this vote of the people. This is shown by the history of the legislation, charter provisions, etc. (ante pages 10-13). All that the election in question did was to approve the acquisition by the city authorities of a system upon certain streets described, and to provide money for the purpose. *The election proposition did not specify how the commission or council should proceed to acquire—this was left to their judgment and discretion in the exercise of lawful means, as was the only wise and proper course to pursue.*

The acquisition of these particular lines (Fort Street and Woodward Avenue) from the plaintiff is still ahead of the city and when in due and orderly course that point is reached, it will be done according to law.

Therefore the only alleged ground for jurisdiction, viz: That the City or rather the defendant officials intended to order the railway company to remove its property off certain streets, or that the officials pretended that such steps would be taken, utterly fails because the ordinance and vote afford no authority for such steps and they add nothing to the power and right previously possessed by the City under the decisions of this Court and the Supreme Court of Michigan, and the charter provisions.

But, Counsel say (brief p. 9), that the bill alleges it has rights to those streets, (Fort Street and Woodward Avenue) acquired subsequent to the decisions of the Supreme Courts of the United States and Michigan mentioned above, and that the Mayor and Common Council have decided upon a policy of forcing the plaintiff, without judicial action upon those after acquired rights, to submit to having its property destroyed by removal and for the ultimate purpose of forcing plaintiff to dispose of its property at an inadequate price. (That such pretended after acquired rights cannot possibly have any existence is shown in this brief post pages 33-59.)

Whether plaintiff has any such after acquired right can be tried and determined when the Common Council attempts to order the plaintiff Railway off the said streets, but no such attempt has been made as yet and the first step will be the passage of a resolution in pursuance of the decree in the Fort Street case. When

such attempt shall be made, if the plaintiff have such after acquired rights, the Court will protect them. If the City officials had such a plan in mind as alleged, their first step would be to pass a resolution to remove and that will be time enough to litigate the question of after acquired rights. *The question is not raised nor the alleged right questioned by the passage of this ordinance or the vote of the people.*

The City cannot force plaintiff into a contract of sale by physical force and if attempted the Courts would enjoin it,—but this ordinance or vote has nothing to do with such a case.

The ordinance is in no way essential to the City's right to eject plaintiff, which right existed before the ordinance in question was passed, and has not been fortified or strengthened in any way by such ordinance or vote. The only effect of the passage of the ordinance and vote is to provide the money (which might have been raised by taxation or other method) with which to build the system in question.

When the City comes to pass a resolution to eject or order plaintiff off the street the matter then comes at once to the Court under the decree already made in the Fort Street case for a writ of Assistance, (See the Decree, R. p. 43) at which time plaintiff may set up its after acquired rights. And if the attempt were to eject from Woodward Avenue on the ground that its franchise expired years ago, then the Court will protect any after acquired right the Company may have.

In fact these questions are now being determined in the State Courts on a bill filed by the City to declare the respective rights in those streets (other than Fort Street) where franchises have expired.

II.

We Submit That the Bill Discloses No Equity:

If the Court should be of the opinion that a federal question is involved, and therefore entertain jurisdiction, we urge that the bill does not state any case for relief.

Three grounds for equitable relief are alleged:

(1) Threatened injury through bad faith of the city officials, in that they intend to threaten to remove plaintiff from the two streets in question, with no real intention of doing it, but only to compel plaintiff to sell at less than the fair value.

(2) That plaintiff has acquired additional continuing rights in Fort Street and Woodward Avenue since the decisions in the Fort Street case, by reason of certain acts of recognition and estoppel on the part of city officials and the people, which rights the city officials threaten to disregard.

(3) That the election was void because the voters were misled by the city officials, and the proposition was improperly submitted.

Of these three in their order:

A:

Threatend injury to plaintiff by reason of wicked, intent of city officials to compel plaintiff to sell its rails and fixed equipment on Fort Street and Woodward Avenue at an inadequate price, by threatening to compel plaintiff to remove such property, without any real intention of compelling the removal, and thereby forcing plaintiff into a sale below value.

This position has already been quite fully answered in this brief, pages (17-26), in discussing the question of jurisdiction, and we refer to the arguments there submitted.

But in addition, we submit that a malicious intent of the mayor to drive "a hard bargain" cannot be ground for depriving the city of its rights—its unquestioned rights, especially since the Mayor has no legislative power to do the act plaintiff asserts is threatened.

This Court and the Supreme Court of Michigan, after exhaustive consideration, held the city had the right, after the franchise expired, to order plaintiff to remove its property. It is not possible that the City can be deprived of this right because some officials intend to say to the Company, "If you are not willing to accept a certain price, the City will pass a resolution requiring you to remove your property."

Twice this Court has held, under substantially similar circumstances, that not only has the City a right through its officials to make such statement to the company,

but that no wrong is committed in case it succeeds, after making such statement, in securing a lower price.

Denver vs. N. Y. Trust Company, 229 U. S. 123;

Newburyport Water Co. vs. Newburyport, 193 U. S. 561, 577.

Any other rule than this would be the height of absurdity, because it would mean that the parties could not negotiate, but that the City must either pay *any* price that plaintiff might choose to ask, or adopt the alternative of compelling evacuation without negotiation.

On the other hand, it is not to be forgotten that the Railway Company has a "big stick" in the negotiations, in that the City does not want service interrupted while removing the old railway and building a new one. May not the Company use that "stick" in making a sale? To say it cannot do so is absurd. There is nothing illegal in its making use of such argument. The same is true of the City. It may urge that the Company would much better yield something from its notions of full value rather than scrap the materials.

Each side has a strong argument, and each may advance it without violating any legal or equitable right of the other.

We submit that the City's rights cannot be taken away or the City estopped or enjoined from exercising its legal rights by any so-called evil intentions or evil motives of its officials. It would seem unnecessary to cite authorities for so elementary a rule.

Evil motives in exercising legal powers by public officials will not vitiate the act, nor will they be inquired into by the judiciary.

McCray vs. U. S., 195 U. S. 27, 54, 55, 56;

People vs. Gardner, 143 Mich. 104;

People vs. Gibbs, 186 Mich. 127.

B.

The second ground for equitable relief is that plaintiff has been given new continuing rights on Fort Street and Woodward Avenue since the decisions of the Supreme Courts of the United States and Michigan in the Fort Street case, by reason of certain acts, agreements, resolutions and ordinances.

It is declared that these acts of recognition were such as to show an imperative need that cars should continue to operate on Fort Street and Woodward Avenue, which were vital portions of the City's system of transportation; and that, therefore, by reason of these acts, the City had conferred upon the Railway Company continuing rights in those streets under the doctrine of the decision in *Denver vs. Water Company*, 246 U. S. 178, 190.

The plaintiff claims in its bill, in almost the identical language of the Denver decision that,

"In consequence of said several acts and proceedings of said common council and the city officials, and of said expenditures under city authority on Fort Street and Woodward Avenue, and its continued operation thereof with the knowledge, consent and approval of the city authorities, and by reason of the facts in this and in the preceding section of this bill, No. 4, set forth, the right of the City of Detroit to require and enforce the removal of said Fort Street lines * * * and Woodward Avenue * * * has ceased; and that the plaintiff has acquired and has the right, and is charged

with the duty of continuing to maintain and operate said lines of street railway in the streets where they are situated *until such time as the discontinuance of such maintenance and operation shall be consistent with the public interest*" (Rec. pp. 7, 8).

The So-Called Acts of Recognition:

The principal acts of recognition (and in fact the only ones set forth so that one may judge of their import) are the "Seven for a quarter" arrangement; the "Day to Day Arrangement" for new lines, the so-called Kronk Ordinance; the Chancery suit mentioned in the Bill; the knowledge of large expenditures upon the lines.

(1) *The "Seven for a quarter" was that of August 7th, 1913, which is set forth in record page 44, 46, made between the D. U. R. and the Common Council, it has never been repealed, although the Railway Company abandoned it as the bill alleges on the—— day of—— (R. p.——), and arbitrarily installed a much higher rate of fare. That "Seven for a quarter arrangement" explicitly provided that it should not affect the rights of either party, that it was 'day to day' only, and that immediately upon repeal of the resolution the existing status as to the decree should be restored and that the City might at once enforce the terms of the decree.*

(2). The so-called *Day to Day Agreements* under which several new lines were constructed by plaintiff, provided expressly that the City might purchase the lines thus constructed at cost less depreciation, whenever it should go into municipal operation (R. p. 23-26)

and also in addition thereto, that the Railway Company, by acting under it, secured no term rights in the streets, but that the Council or the people of Detroit, at their pleasure or caprice, could revoke the permit and the Company would immediately forthwith remove its property, and in the broadest possible language, that action under this Day to Day Agreement should not waive the rights of either party in any way, but each reserved all its rights whatever they might be.

In the face of these most explicit legal and moral undertakings, plaintiff in direct repudiation of its plight-ed word claims in this suit that these acts confer upon it continuing rights in the streets of Detroit.

Is it any wonder the City authorities regard it as dangerous to have any dealings with this company which treats the most solemn engagements as mere "scraps of paper."

(3) *The Kronk Ordinance* contained this final clause:

"This ordinance may be amended or repealed at any time by the Common Council. Unless so amended or repealed it shall remain in force for one year."

As this was repealable at will, it did not conflict in any degree with the constitutional provision, and was in express conformity with it.

(4) The Chancery suit in the name of the City of Detroit in the Wayne County Circuit Court, in June 1919, (bill of complaint p. 48) is without significance in this inquiry. An examination of the bill in that case will show that it was framed *to enforce franchise rights* only on the so-called Pingree lines. The plaintiff has no franchise rights on Fort Street or Woodward Avenue,

south of Milwaukee (the parts referred to in this bill). The institution of that suit has no bearing as to those streets because it did not attempt to recognize or enforce any rights except upon those streets or portions of streets, whereon franchise rights existed. Moreover the decree in that cause provided:

"This order in no manner affects or is intended to affect any fundamental rights or contractual rights of the parties in and to the streets of the City of Detroit as they exist at the present time, the intention being simply by the making of this order to provide for the rate of fare in which cars will be operated at present and is to be considered only as a temporary solution of the problem before the court."

Such temporary arrangements do not affect fundamental rights; say both the Supreme Courts of the United States and Michigan.

Detroit vs. D. U. R., 107 Mich. 320, 321;

Detroit United Railway vs. Michigan, 242 U. S. 253-4.

(5) *The other acts and resolutions depended upon* are stated only in the most general terms in the bill (R. pp. 6, 7). The simplest rules of pleading require that if any dependence is placed upon the terms of such resolutions, such terms (at least the important parts thereof) shall be stated.

But not only did the plaintiff fail to state the substance of any such acts or resolutions, but it positively refused to incorporate a sample of them in the record before the Court below (R. p. 65).

The Court would necessarily imply that they were ordinary police regulations such as a resolution reciting

the dangerous conditions of tracks and pavements and an order to correct—and similar resolutions of like character.

In the absence of plaintiffs stating explicitly the language on which it relies, as confirming new rights, such vague allegations will be disregarded.

(6) *Expenditures—*

It is further alleged in plaintiff's bill that plaintiff has expended large sums on Fort Street and Woodward Avenue, since the expiration of the franchises

"with the knowledge, acquiescence, and either tacit or express approval of said City and its officials (R. p. 6).

and therefore the City, having stood by and observed these expenditures, and reaped the benefits, plaintiff has acquired permanent rights by acquiescence and estoppel (R. pp. 6, 7, 8).

The Alleged New Franchise Rights in Fort Street and Woodward Avenue:

Having thus stated, as we believe fairly, the substance of the plaintiff's alleged grounds for the acquisition of new and continuing rights in Fort Street and Woodward Avenue, since the Fort Street decree, let us ascertain whether they have any foundation in law or fact.

These so-called new rights are all based in the bill upon the acts or omissions of the Common Council or other officials of the City of Detroit. It is demanded by the plaintiff that they be declared to be continuing rights, contrary to their express terms and in repudiation of plaintiff's most solemn engagements.

A Decisive Answer.

We submit there is one decisive answer to all these claims of alleged new right, one outstanding fact that deprives each and every one of them of any force whatsoever. These claims, we submit, are all swept aside by the simple statement that even if the Common Council and every officer of the City of Detroit had united in one express act or ordinance, not reserving any rights in the City, but explicitly conferring upon the plaintiff the very rights which it would now have raised by implication, or which it would have the Court infer from such ambiguous and indefinite acts and resolutions, it would have been utterly void and of no effect.

The reason is, that the Constitution of Michigan, adopted in 1908, provides that no City or Village shall grant any public utility franchise, which is not subject to *revocation at the will of the City or Village*, except upon a vote of three-fifths of the electors (quoted fully, *Supra*, p. 7).

It would seem unnecessary to argue such a proposition as is now presented in face of this striking and decisive language.

In the Fort Street case it made substantially the same claims, based upon the alleged necessities of the people for its service. It alleged that the transportation system of Detroit would be broken down and its industries paralyzed without its continued service, and that, therefore, by public necessity, it was under a bounden duty to continue to serve, and, therefore, it had a right to serve until some new provision was made. But the Supreme Court of Michigan held directly the contrary (See *Ante* pp. 3-5).

The Railway Co. alleged then, as it says now, that it had a duty to the public to continue to operate—but only at a price and a profit.

Other people abide by their undertakings even if it results in bankruptcy, but not so this institution, it must have at all times a profit. It demands in this bill of complaint a high standard of morals for the City and its officials. The City must not even drive a sharp bargain in purchasing D. U. R. property—but the D. U. R. may refuse to run, to keep its word, if it will lose any money thereby.

It denounces with vituperation and abuse the city officials for their alleged attempts to retake the City's own, as an attempt to purchase something below value, but it may break its agreements on the plea of necessity, and would even demand practically permanent rights in the streets of Detroit, against its own written plighted word not to make any such claims.

It is fortunate that the whole people of the State of Michigan were wise enough to put up a Constitutional bar, which prevents the seizure of those continuing rights on account of the acts or omissions of the representatives of the people. Only a three-fifth vote of the electors can confer such rights.

The Denver Water Case:

But it is argued that the Denver Water case is a precedent governing this case (246 U. S. 178).

If the Court in the Denver Water case had held that the ordinance in that case conferred the rights declared

by the decision, in spite of a constitutional provision, such as that of Michigan in this case, it would have called for nice discriminations between the acts of the Common Council in that case and this, which could be readily pointed out, but no constitutional provision was before the court in that case. The Common Council of Denver had full right to grant a franchise to the Water Company, so far as the case shows. In that case the Court held that the Common Council of Denver had granted a new franchise to the Water Company by express words.

The court said:

"The alternative which we adopt is to construe the ordinance as the grant of a new franchise of indefinite duration. • • •"

It is not necessary for us to distinguish this case (which could be readily done for a number of pertinent reasons,) because the court had no constitutional provision before it forbidding the Common Council to grant any such franchise.

In our brief, submitted to this court on the motion to dismiss or affirm, we said, referring to the Denver case (our brief pages 20, 21):

"In the Denver case, 246 U. S. p. 178, relied on in the court below, by plaintiff's counsel, the Common Council had full power to grant rights in the streets to the Water Company and the Court held that it had actually, under the terms of the grant, done so. There was no constitutional provision against such action as in this case. In the present case, if the Common Council had tried to do so, expressly, it would have been void. Certainly it could not accomplish any more in that direction

when it was not trying to do anything or confer any rights than if it had explicitly undertaken to confer such rights."

Judge of our surprise on receiving the brief of plaintiff's counsel in opposition to our motion to dismiss, to read the following (their brief, p. 11):

"The Colorado Constitution contained Article 20, Section 4, relating to the City and County of Denver, (1 Mills Statutes, Colo. p. C-277), the provision that: 'No franchise relating to any street, alley or public place of the said City and County, shall be granted except upon vote of qualified tax-paying electors' * * * In this Denver case it was the ordinance of the Council which was held to give a franchise right of indefinite duration, *notwithstanding the constitutional inhibition upon franchises granted otherwise than by popular vote.*" (Italics—theirs)

Astounded at this statement, we searched the Colorado laws and found there was a provision applying to the City and County of Denver. We then turned again to the opinion of this Court in that case (246 U. S. 178) and found no reference whatever to any Constitutional provision. We then corresponded with the attorneys in the case, two of whom advised us that no reference had been made to the Constitutional provision either in the briefs in that case or on the arguments.

We, therefore, believe that we are warranted in saying that the Denver decision was rendered in a case where no claim was made but what the Common Council had full power to make a franchise grant and that it is not, in any degree whatever, a precedent in this case.

Further research has called to our attention that in the earlier case of *Denver vs. New York Trust Company*, 229 U. S. 123, the Court, in the course of a twenty page opinion, did refer to that Colorado constitutional provision, but it is not mentioned in the head-notes of the case. It is also noticeable that none of the attorneys in the earlier case (argued in 1912) was engaged on either side in the second case, five years later.

The Constitution is a Bar:

We submit the Constitution of Michigan prohibits in the most explicit possible terms the Common Council or other officials of Detroit, from granting either by positive act or by omission or by any indirection whatsoever, such a franchise as is now claimed by the plaintiff and made the basis of this suit. It would seem that authorities are unnecessary but nevertheless, we appeal, strikingly enough, to this very same first *Denver Water case*, and from the opinion in that case by Mr. Justice VanDevanter, quote as follows (229 U. S. 139-40):

"Besides article 20, Section 4, of the State Constitution, then in force, provided that no franchise relating to the streets of the City should be granted except upon a vote of the electors and article 9 of the City Charter then in force made a like vote and prerequisite to the acquisition of the City of any public utility. So, had the Council attempted by the ordinance of 1907, to make an election to purchase or to renew (the franchise) the attempt would have gone for nothing."

Thus, we find this court, in a like case, has explicitly declared to be sound the very doctrine we stand upon, that, as the Common Council could not directly or affirm-

atively give such rights in the streets, no ambiguous acts on its part or omissions could be construed as having such effect.

The city authorities having no power to grant directly rights in the streets except those revocable at will, cannot do so by indirection. Having no power to grant the same by express act, none such may be implied.

Eaton vs. Shiawassee Co., 218 Fed., 588;

Litchfield vs. Ballow, 114 U. S., 190, 193;

Hedger vs. Drdon Co., 150 U. S., 182;

Niles Water Works vs. Niles, 59 Mich., 311;

Detroit vs. Robinson, 38 Mich., 108;

Spitzer vs. Blanchard, 82 Mich., 246, 248;

McCurdy vs. Shiawassee Co., 154 Mich., 550.

In *Eaton vs. Shiawassee*, *supra*, the county had borrowed and used the money for a county building, but without a vote of the people as required by the constitution. Held that defendant could not recover directly or indirectly on the bonds or for money loaned or money had and received. "Until the vote of approval is given, the county is as much without power as if the electors had no right to confer it."

In *Litchfield vs. Ballow*, *supra*, Mr. Justice Miller on this point said:

"If this provision is worth anything it is as effectual against the implied as the expressed promise and is as binding in a court of chancery as a court of law."

In *Spitzer vs. Blanchard*, *supra*, the Supreme Court of Michigan said:

"There can be no implied liability of a village where there can be no binding expressed contract."

In *Detroit vs. Robinson, supra*, the court said:

"The City cannot be held liable for work done for its benefit as upon an implied contract, for the law will not imply a promise as against the City where it could not make an express contract."

In *McCurdy vs. Shiawassee County, supra*, the Supreme Court of Michigan said:

"All persons dealing with counties are bound to ascertain the limits of their authority fixed by statute or organic law and are chargeable with knowledge of such limits. 11 Cyc. 468 and cases cited. This Court has held that the doctrine of implied liability has no application in cases where the liability can only be created in a certain way. 56 Mich. 95."

As To Estoppel:

But it is argued in the brief for appellant, page 62, that the city is estopped by the acts and omissions of the Common Council and officials, set out in the bill, to deny plaintiff's continuing rights in the streets and reliance for this contention is placed upon

City Railway vs. Citizens Street Railway, 166 U. S. 567;

Essex vs. N. E. Telegraph Company, 239 U. S. 313;

But those cases have no application where there is a constitutional provision forbidding the Common Council to exercise any such power or make any such grant. They are only applicable where the Common Council had the authority originally to make the grant which the Court held the city was estopped to deny. This, we think, is fundamental and disposes of all arguments

based upon estoppel, not only in the "Brief for Appellant" but in the brief of former Justice Hughes, filed upon the motions in this cause (pp. 11, 13, 14).

In both of the cases relied upon by appellant's counsel (Essex and City Ry. *supra*) the Common Council had full power to make the grants in question.

In the *Essex case* the exact waiver involved was the waiver of the right of the town authorities to impose certain restrictions and regulations upon a telegraph company exercising a right under congressional authority to place wires and poles in the streets of the town. The Court said (p. 320):

"A city may not arbitrarily exclude the wires and poles of a telegraph company from its streets but may impose reasonable restrictions and regulations."

In the *City Railway case*, *supra*, the Common Council, had by ordinance attempted to extend the franchise for seven years and the Court said the ordinance "was attacked principally upon the ground of a want of consideration for the extension of the franchise for seven years." No question was raised whatever about the constitutional power of the Council to make the grant and the Court held that the company, having placed a new loan in the market upon the faith of this extension, the city was estopped and the Court in that connection said:

"All that is necessary to create an estoppel *in pais* is to show that upon the faith of a certain action on the part of the city, *which it had power to take*, the company incurred a new liability."

The distinction is recognized by all of the authorities between an estoppel as to action within the power of a

municipal corporation and estoppel with respect to ultra vires acts.

7th L. R. A., 1248, and notes.

L. R. A. 1915-A, 994.

Parkersberg vs. Brown, 106 U. S. 487, 501.

Dickson County vs. Field, 111 U. S. 83, 92.

Lake County vs. Graham, 130 U. S. 674, 683.

Eddy Co. vs. Crown Point, 3 L. R. A. N. S. 684, 689.

State vs. Murphy, 134 Mo. 548.

Cole vs. Cedar Rapids, 118 Iowa 334.

In *Lake County vs. Graham*, 130 U. S. p. 683, the Court said:

“ * * * In this case the standard of validity is created by the Constitution. * * * These being exactions of the Constitution itself, it is not within the power of a legislature to dispense with them, either directly or indirectly, by the creation of a ministerial commission whose finding shall be taken in lieu of the facts.”

The sole purpose of the constitutional provision requiring a vote of the people was to take away all power of the officials or representatives to bind the municipality, because of a long history of scandals and corruption. If they may do it by omissions or ambiguous acts, then the Constitution is set at naught.

Where a vote of the people is required as a condition to the validity of a grant, any such grant, formal or informal, without the vote is void and no estoppel can be raised against the municipality either by lapse of time or receipt of benefits or any negotiation whatsoever.

Hagerman vs. Hagerman, L. R. A. 1915-A 904.

Eaton vs. Shiawassee Co., 218 Fed. (6th C. C. A.) 588.

Salt Creek Township vs. King Iron Co., 51 Kan. 520.

Wormstead vs. Lynn, 184 Mass. 425.

Daniels vs. Long, 111 Mich. 562.

Smith vs. Newberg, 77 N. Y. 136.

Lynchberg vs. Person County, 109 N. C. 159.

Defiance vs. Defiance, 13-23. Ohio C. C. 96.

State vs. Pullman, 23 Wash. 583.

Note to L. R. A. 1915-A, page 998.

"Hagerman vs. Hagerman, supra, holds that where by statute a municipal corporation is prohibited from entering into a contract for the acquirement of a waterworks system for domestic purposes without first holding an election, and securing a favorable vote of the electors on the question, *a contract of this character entered into without such election is absolutely void, and the receipt by the corporation of benefits thereunder does not operate to estop it to assert the invalidity.*

Salt Creek Twp. vs. King Iron Bridge & Mfg. Co., 51 Kan. 520, holds where a contract by a township officer for the construction of a bridge is void under a statute defining how bridges shall be built and paid for, and which was not complied with in that the proposition to build the bridge did not carry by the necessary majority, *the acceptance of the bridge by the officers, and its use by the public, do not estop the township to assert the invalidity of the contract.*

Wormstead vs. Lynn, 184 Mass. 425, holds that a city or town, by practice or custom, may not authorize an officer to make contracts in its

behalf, and may not by such practice or custom be estopped to deny his authority in this regard, where no one is authorized to make such contracts until a vote of the city or town has been passed authorizing the same.

Daniels vs. Long, 111 Mich. 562, holds no estoppel arises to assert the invalidity of a contract for waterworks as against a contractor having knowledge of the invalidity at the time of executing the contract. In this case the contract was invalid because not carried by a two-thirds vote of the voters residing in the municipality.

Smith vs. Newburgh, 77 N. Y. 136, holds an absolute exercise of authority by officers of a corporation in violation of law cannot be upheld, and where officers of such a body fail to pursue the strict requirements of the statute delegating the power exercised, the corporation is not bound, and a person dealing with it is obliged to see that such provisions have been fully complied with. (Failure to submit question to a vote of the electorate.)

Lynchburg & D. R. Co. vs. Person County 109 N. C. 159, holds that where the only authority that can fasten upon a township an obligation to pay a subscription to stock in a railroad company is a duly ascertained vote of the majority of its qualified voters, without such vote any action of the county commissioners or township justices in appointing agents to subscribe for or represent each vote of said township in the stockholders' meetings is a nullity and ultra vires, and cannot operate to estop the municipality.

Defiance vs. Defiance, 13-23 Ohio C. C. 96, holds that where a contract by a city to pay hydrant

rentals is invalid because the council did not comply with the statute requiring a vote ratifying the contract, no action by the council in recognition of the contract or payment of rental thereunder can estop the municipality from asserting the invalidity of the contract, since where the council by its direct action cannot bind the city, it cannot do so by any indirect action.

State vs. Pullman, 23 Wash. 583, holds that courts only estop municipalities from interposing a plea of ultra vires and from escaping the responsibility of their acts where there has been a defect in the execution of the contract within the power of the municipality to make, and not where, because the matter has not been submitted to a vote as required by law, there has been absolute want of power upon the part of the municipality to contract."

Estoppel by Inaction of the People:

In the "Brief for Appellant," at pages 57 to 61, inclusive, it is argued that such a franchise as this

"may be created either by consent or grant of the municipal officials, or in the absence of such grant, may be created by the acquiescence of the people of the municipality in the improvement and continued operation of such tracks, pursuant to the direction and consent of the municipal officials. As a municipality may be estopped through action or acquiescence of its officials, in a matter over which they have power, so in a matter over which the people have power, it may be estopped by the people's acquiescence in a tacit approval of action

taken under the direction of the municipal officials" (brief p. 57).

and

"Those expenditures were made in part under the explicit direction and in all cases with the permission of the principal municipal officers. The public knew of these things and tacitly approved them and have enjoyed the benefits for some seven years after the time when by the Fort Street decree the City's power of ouster was made legally effective" (brief p. 61).

Thus it seems a grant of a franchise by *estoppel on account of inaction by the people themselves* is somewhat modestly and diffidently claimed in that brief. No such proposition of law is advanced or countenanced in the other brief (Brief of former Justice Hughes).

No authority is given for any such new and startling doctrine, no precedent or analogous case. We do not know how seriously this claim is presented, since no argument or authority is presented for it.

If such new doctrine is to be made the law, it will leave the people helpless indeed; for they have done all they can do in their organized capacity, to prevent the seizure of the streets.

Would it be held that the people must proceed by mob law to take the matter in their own hands. They have solemnly warned the railway company "you can get no rights in our streets except by three-fifths vote of the people at an election," and the Railroad Company knew this and deliberately agreed to it, in making any expenditures or other moves, for these were all done under day to day agreements.

These expenditures were made from time to time under most solemn engagements that no rights in the streets should be claimed thereby; and all the time the revenues were flowing in upon them, and they were paying handsome dividends and rolling up surpluses. The Railway authorities knew the Constitutional limitations and with utmost deliberation took their chances. They knew that the property as such remained theirs and that in all human probability the City would want to keep the property when ready to operate itself, and would pay for it, because of the decisions of this court, holding that they were entitled to be paid for it or remove it.

What is the contention of the other side upon this question?

Must the people decide for themselves that no agreement which the railway made was binding upon it, and that the people must take up arms against their own representatives as well as the Railway Company, and go blindly ahead and smash the whole works.

Such is the logic of this "Brief for Appellant". (Is this logic repudiated by the silence of the other brief?).

The logic is not sound. This is a republic, not a democracy. Public action is taken through representatives duly chosen, whose acts are subject to well defined constitutional limitations which must be observed. They are known to all parties, and all dealings with the public are held with full knowledge.

This Company made no move except in view of those limitations (to say nothing of the expressed agreements) and it took good care to calculate the revenues and the costs.

The first element of estoppel is lacking because the Railway Company took no action except with eyes wide open and did nothing on the faith of any action or representation of the people.

Crane vs. Reeder, 25 Mich., 303;

Fletcher vs. Judge, 81 Mich., 186;

2 Pom. Eq. (4th Ed.) Sec. 805.

But rules of law established for centuries, seem to cut no figure with the counsel for plaintiff, for they ask you to ignore or override the following:

1. It has been a rule for many years that people must abide by their agreements, even street railways.
2. It has been a rule that there can be no estoppel against the people by reason of acts or omissions of their representatives where those representatives have no power to act.
3. It has been a rule that there can be no estoppel against the public by reason of their own inaction.
4. It has been a rule that there is no estoppel where the person claiming the estoppel acted with full knowledge.
5. It has been a rule that there can be no estoppel in favor of one who has taken no action on the faith of any act or misrepresentation by the opposite party.

We invoke these rules. They are sound and meritorious.

Moreover the cases cited and quoted above are direct authorities against this position of *some* of plaintiff's counsel.

See cases ante pages 46-49.

A Refined Distinction About the Kind of Franchise:

In the "Brief for Appellant" (page 57) it is attempted to refine away the constitutional limitation on granting of franchises by calling this "a right in the nature of a franchise." It is said:

"It is our position that although under the Michigan Constitution a popular vote is necessary to validate the grant of a *term* franchise (Italics theirs), a right in the nature of a franchise to continue the use of tracks until their discontinuance shall be consistent with public interest, may be created by consent or grant of municipal officials, etc."

The Constitution says nothing about a *term* franchise. It says *any* franchise.

The claim of the plaintiff to these certain new rights is based entirely upon the decision in the second *Denver Water case*, and the right which it claims is precisely the right held to have been conferred by the ordinance of the Common Council in that case, and which was defined by the learned Justice who wrote the opinion, as follows:

"The alternative which we adopt is to construe the ordinance as *the grant of a new franchise of indefinite duration* * * *, terminable either by the city or the company at such time and under such circumstances as may be consistent with the duty that both owe to the inhabitants of Denver."

This is the kind of a franchise, which plaintiff claims, by its bill of complaint (Rec. p. 8) and throughout its brief, has been conferred upon it by the acts, agreements and resolutions set forth in the bill. It was held, in that

Denver case, to be an affirmative grant by an ordinance enacted by the common council.

Clearly it was not a "franchise revocable at the will" of the grantor. It was revocable only when such action comported with the needs of the citizens for water service. This might run for years and could not be argued to be one terminable at the will of the maker.

"Revocable at Will."

A franchise revocable at the will of the grantor could be revoked at any time with or without reason, and without reference to the interests of the people, and if need be, against their interests and positively without any inquiry as to such interests.

Under the Fort Street decisions of the Supreme Court of Michigan and of this Court, the city had the right to give notice any day to remove from the street, without any reference to whether it was in the public interest, or whether it would be an injury to the public.

But now the counsel for plaintiff say that, by these acts and omissions of the common council, the city has lost this right, and the company has a right to stay in the street continuously until the "public interest" justifies its removal.

Such, beyond any doubt, is not, then, a "franchise revocable at will," which is called for by the constitutional provision.

Greenwood vs. Freight Company, 105 U. S., p. 13;

Bridge Co. vs. U. S., 105 U. S., 470;

Hamilton Gas Light Company vs. Hamilton, 146 U. S. 258;

Calder vs. Michigan, 218 U. S., 591.

Peck vs. D. U. R., 180 Mich. 343, 347-8.

In *Greenwood vs. Freight Company*, 105 U. S. Supra, the Court was considering the right of repeal of a corporate charter under a Massachusetts Statute providing that every act of incorporation should be subject to repeal "*at the pleasure of the legislature.*" The Court said:

"It would be difficult to supply language more comprehensive or expressive than this * * * all this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend upon the necessity for it or on the soundness of the reasons which permitted it. This expression 'the pleasure of the legislature' is significant * * *"

In *Bridge Co. vs. United States*, Supra, the court said:

"Congress reserves the right to withdraw the assent hereby given * * * The withdrawal of assent has been left to depend upon the judgment of Congress in the exercise of its discretion. * * * What the company got from Congress was the grant of a franchise expressly made defeasible at will to maintain a bridge across one of the great highways of Commerce. This franchise was a species of property but from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant. * * * A withdrawal of the Franchise might render property acquired on the faith of it less valuable but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give * * *"

In *Hamilton Gas Light Company vs. Hamilton, supra*, the Court hold the power of repeal to be arbitrary and say:

"These views are supported by the decisions of this court (citing the *Greenwood case, supra*). The words 'at the pleasure of the legislature' are not in the clauses of the Constitution of Ohio or in the Statutes to which we have referred, but the general reservation of the power to alter or repeal a grant of special privileges necessarily implies that the power may be exercised at the pleasure of the legislature" (270, 271).

In *Calder vs. Michigan, supra*, it was alleged that the Mayor and city authorities carried out an unfair scheme for getting the repeal hurried through the legislature without notice to the company. The court held the power to be absolute and said:

"We do not inquire into the knowledge, intelligence, methods or motives of the Legislature, if the repeal was passed in due form" (pp. 598, 599).

Peck vs. D. U. R., 180 Mich., 343, 347-8. In this case one of the day to day agreements was before the court for construction. The Court said:

"What is the grant in question? The most that can be claimed for it is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise or permit. Its important feature in this discussion is that whatever it is termed it is revocable at the will of the City, whenever the public interest requires its termination. *By its terms this is to be determined by the common council or people of Detroit at their pleasure or caprice.* * * * *This power can be exer-*

cised without complying with any conditions. It can be exercised at the will of the Common Council or the City and is independent of any other condition."

(The italicized portions above are omitted from the quotation from this case made by counsel for plaintiff, in their brief at page 58.)

These cases establish that "at will" means with or without reason, for whim or caprice, for good or ill, for the benefit of the people or for their detriment.

But it is now claimed by counsel that we can do it only when it is for the peoples benefit, of which somebody else must be the judge besides ourselves.

If this be true, then it is a franchise which has been granted in defiance of the words of the Constitution, which call for one revocable at the will of the grantor.

We shall not enter into any prolonged discussion or examination of the authorities about what is a franchise. The language of the Constitution is very broad, and says "any franchise." The right claimed by the appellant here is declared by the Supreme Court of the United States itself to be a franchise, and it, beyond any dispute, is not a franchise revocable at will. Therefore, it conflicts with the plain constitutional provision.

About an Implied Franchise:

In the brief of Mr. Hughes (pp. 12, 14) he very subtly attempts in various places to inculcate the idea that this claimed franchise is a franchise *by implication* and not by direct grant.

Distinguished counsel undoubtedly thereby attempts to get away from the plain language of the Constitution, which forbids "any franchise," and he seeks to establish a new kind of a franchise, namely, one raised by implication from the necessities of the case, and to ask this Court to hold that it is not such a franchise as was within the purview of the words of the Constitution.

Thus is an attempt made to take away from the people, by subtle reasoning, the very rights which they sought to preserve by the words of the constitution, "*any franchise*."

These implied franchises are the most dangerous kind, the most elusive, and the most difficult to deal with. You know what an express franchise means, but an implied franchise easily escapes when you seek to lay hold of it.

But there is no warrant for this reasoning of an implied franchise. The decision in the *Denver case* holds it to be an express franchise, not an implied one (246 U. S., 190). It arose from express grant, namely, an ordinance defining the rights of the parties.

Moreover, the Supreme Court of Michigan in the Fort Street decision has itself declared that *there is no implied franchise arising from the necessities of the people* for this service; and we take it that this Court would hold itself bound by the decision of the Supreme Court of Michigan upon that subject, especially as this Court affirmed that decision of the Supreme Court of Michigan.

We have but to go back to the original decision in the Fort Street case. In that case the counsel argued exactly what they argue in this case, that the public interests demanded the continuation of this service and that they were in duty bound to perform the service until the

public provided some other means, and that a corresponding right was thereby created by implication of law in the railway company. This reasoning was explicitly repudiated by the Supreme Court of Michigan (See this brief ante pp. 3-5).

It is curious and somewhat amusing to note the conflicting claims in the briefs of counsel. In the brief of the distinguished former Justice it is claimed that this is a franchise by implication of law. No such claim is made in the brief of the other counsel, who were in the former D. U. R. case, and who know that such claim has been repudiated by courts in suits between these same parties, and who are well aware that the Denver case itself declares the alleged franchise to be an express franchise.

On the other hand, the brief of Mr. Stevenson claims that the inaction of the people themselves creates a new franchise by estoppel (See Brief at pp. 57, 61). But no such claim is made in the brief of Mr. Hughes.

There is a silent conflict between these briefs that is more eloquent than words.

C.

The third ground urged by plaintiff for equitable relief is (B. p. 37):

The proposition to acquire a street railway system was not so submitted to the voters that their affirmative vote thereon authorized such acquisition.

Summarized, plaintiff's objections under this paragraph are that the election and ordinance are void because of:

(1) Misrepresentation to the electors, in the message of the Mayor to the Common Council; in the map issued by the Board of Street Railway Commissioners and in public speeches by officials and newspaper articles.

(2) Misunderstanding of the proposition by the electors, and

(3) That an exact copy of the ordinance was not printed on the ballot.

What misrepresentation or misunderstanding existed?

It is very hard to comprehend the involved and complicated reasoning of the plaintiff's bill on this subject (See R. pp. 11-21) and if it is not understandable that fact ought to be sufficient reason for dismissing such a claim because to overturn an election—a decisive election on an important matter—should require very clear and explicit reasons.

It is well in the first place to note that the proposition submitted provides for just two things, first, the approval of the proposition by the electors to acquire municipal lines on certain streets and second the voting of bonds for \$15,000,000 for the project.

Nothing else is in the proposition submitted—and the ordinance itself was published as required by law.

All of the complaints of counsel for plaintiff about misrepresentation of the proposition and of the misunderstandings by electors consist of extraneous alleged facts entirely outside of the proposition.

They allege that the Mayor and others represented that it was not intended to *construct* on Fort Street and Woodward Avenue and certain day-to-day lines but to take over those parts of the plaintiff's lines *by purchase*, whereas the proposition did not so provide. A consideration of the message of the Mayor to the Common Council (R. pp. 51-2-3) conclusively shows that the plan was in no sense dependent upon a purchase of these lines. His message clearly recognizes that purchase is merely considered possible. He does not claim that this purchase can be consummated without a further approval by the electors.

The ordinance and proposition only provide for the *acquisition* of a street railway on the routes described (Ordinance, R. pp. 27-41). They say *nothing* about any purchase of plaintiff's lines on certain of those streets. But it is shown, says plaintiff, that the Mayor and other officials stated to the people orally and in writing that it was a part of the plan of procedure under the ordinance and vote to purchase these lines from the plaintiff. They led the people to believe (say plaintiff's counsel) that the ordinance and proposition author-

ized that method which was not true, hence the election must be set aside.

The learned judge below on this point says:

"It is urged that the voters were deceived through oral and written statements of public officials into a misunderstanding of this ordinance. It was correctly published according to law. I hold that those acts complained of were unofficial acts and that they have no more bearing upon this legal proposition than they would if said by some private citizen or one of the papers in this city.

"I hold that this Court cannot inquire into the things that influenced the voters and as far as I can go in that direction is to inquire whether or not the ballot on which this question was submitted was a proper ballot. As to the things done in the campaign by private individuals or public individuals, that is outside of the scope of proper investigation of this Court.

"The form of the ballot and whether the question was submitted by a proper ballot and in a proper manner to the voters is a judicial question. It is not necessary under the law that the entire ordinance be on the ballot but that it be fairly described and identified with the ordinance which has been published in such a way that the public may know what it is that they are voting on and I hold that this ballot does properly submit that question to the voters of the City and did so submit it."

Ballot requirements:

A reading of the ballot whose language was prescribed fully in Section 2 of the ordinance (R. p. 34) shows that the proposition was fully described and with precise elaboration and that nobody could misunderstand it. Not only so but the ordinance was published and the proposition on the ballot might well and lawfully have been in much shorter and more compact shape, but great care was taken to make the ballot full and clear.

The authorities are explicit and uniform that all that is necessary to be put upon the ballot is a clear identification of the proposed law or ordinance to be voted upon and sufficient to show its character and purpose.

State vs. Winnett, 10 L. R. A. (N. S.) 149.

Kreman vs. Portland, 57 Ore. 454.

Washington vs. Dency, 4 Wash. 135.

State vs. Longworthy, 55 Ore. 303.

Olivers vs. Lainsville, (Ky) 217 S. W. 907.

Burton vs. Detroit, 190 Mich. 195, 203.

In *Burton vs. City of Detroit*, 190 Mich. 195, 203, the question arose as to the sufficiency of the form of submission. A proposed charter amendment, giving authority to the common council to fix the salaries of certain officials of the City, was to be submitted. The amendment itself was not printed upon the ballot and the form of submission was of the most general character. This was the language:

"Do you favor authorizing the Common Council to fix the compensation of certain elective and appointive officers of the City of Detroit, within

certain limitations; also to fix the compensation of the subordinates to such officials?

Yes

No."

The Court said:

"We are of the opinion that the form of the ballot was sufficient to fairly apprise the electors of the purpose and effect of the proposed amendment."

In the present case the entire proposition was printed upon the ballot in utmost detail and the *only* complaint is that it did not include an absolute specific direction to *construct* instead of general authorization to *acquire*.

The word "acquire" is used in the constitutional provisions cited; also in the statutory and charter provisions and throughout the ordinance and proposition. A construction of the ordinance or proposition can reach no other result than that a plan of acquisition is contemplated. The word "acquire" as thus used, comprehends the right to both purchase and construct, either or both. It was so held in an analogous case including the municipal ownership of a lighting plant.

Clark vs. Los Angeles, 160 Calif. 48.

Anchor Investment Co. vs. Columbia Electric Co., 61 Minn. 510.

It was entirely competent and proper to submit the proposition as one to *acquire* a system, thus leaving to the Common Council and officials the alternative methods of purchasing or constructing upon those few streets where lines already existed. Any other course would have been unwise. And if the direction on the ballot had been rigid, compelling the authorities to *construct* only, it would have been destructive of plain-

tiff's property, and the plaintiff would have been the first to complain.

The course taken was lawful and competent under the authorities.

Sioux Falls vs. Farmers' Loan & Trust Company, 136 Fed. 721, 732.

State vs. Allen, 178 Mo. 555.

State vs. Gordon, 223 Mo. 1, 2, 17, 20.

In *Sioux Falls vs. Farmers' Loan & Trust Company*, supra, the Court said: (Van Devanter, Circuit Judge, being a member of the Court)

"The question was submitted in the exact language of the statutes, and the sole proposition submitted to be voted upon was whether or not the city should issue bonds to the amount of \$210,000 for the purpose of providing water for domestic use. Nothing is said in the statute about submitting to the electors the proposition whether the city shall construct or purchase a system of waterworks. That was a matter to be determined by the city council, under the powers conferred upon it, and with which the electors had nothing to do."

In *State vs. Allen*, supra, the proposition submitted was in effect the issuing of bonds "for the purpose of constructing, maintaining, and operating or purchasing an electric light plant." It was contended that there were submitted to the vote of the people two propositions, one to increase the debt for the purpose of constructing, and another for purchasing an electric light plant already in the town. The court, however, in distinguishing a Washington State case, said:

"There is a marked distinction between that case and the one at bar, in this:—in that case

there were clearly two distinct propositions, having different objects in view, *while in the case at hand, the proposition submitted to the voter, was to increase the bonded indebtedness of the town to purchase or erect an electric light plant.* The same end was—intended to be accomplished, but in two different ways, to be determined upon by the board of trustees in the exercise of their discretion. The proposition submitted to the voters was the exact proposition that they were called upon to decide, and in a way that could not mislead any one, and *while it is in all probability true that some of the voters might have wished to vote for the erection of the plant, and others to purchase a plant already erected, and they did not have the chance to express their views in this regard, we do not think that such fact invalidates the election that was held, or the bonds that were issued by the town in pursuance thereof."*

Misrepresentations to electors:

But it is said that the Mayor in his speeches misrepresented the effect of the proposition by leading the people to suppose that the method of purchase of existing lines on Fort Street and Woodward Ave. was planned, and that the people supposed the proposition was committed to that course. (This is not correct as shown hereinafter.)

If an election is to be set aside because public speakers, officials or newspapers make erroneous statements about the question presented, or the meaning of the language in the proposition or matter to be decided

for the questions presented, then no election would stand.

In fact, in this case the Proposition was debated from every angle by the organs of public opinion and from scores of platforms. The points now being made were made before election, and the voters had before them all views of the matter (R. pp. 11, 12, 14).

But as a matter of law, courts have no jurisdiction, we submit, to try the question as to what statements influence voters.

The voters in this instance were *quasi-legislators* and no rule is better settled than the one that Courts will not and can not determine what motives or reasons influenced them in voting as they did, or upon what information or arguments they acted.

Angle vs. Chicago Ry., 151 U. S. 1, 18-19.

New Orleans vs. Warner, 175 U. S. 120.

McCray vs. U. S., 195 U. S. 37, 54-56.

Chesapeake vs. Manning, 186, U. S. 245.

People vs. Gardner, 143 Mich. 104.

Soon Hing vs. Crowley, 113 U. S. 710.

People vs. Calder, 153 Mich. 724.

Allen vs. State, 44 L. R. A. (N. S.) 468, 469.

Epping vs. City of Columbus, 117 Ga. 263, 285.

In *Allen vs. State*, 44 L. R. A. (N. S.) 468, 469, the Court said:

"If the measure as it is now contended, was to be submitted to the voters at the wrong election, or if, as it is now urged, it was impossible to give the measure the publicity required, the courts were open to any citizen, and possessed the power, upon a proper showing, to confine the adminis-

trative acts of officers within the law. Timely appeal to the courts upon the question now raised, if meritorious, would have settled the matter before the election was had. However, the measure was submitted to the voters without question. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question, and went to the polls and voted thereon."

In *Angle vs. Chicago, St. Paul, etc., Railway*, 151 U. S. Rep. page 1, the court said, at page 18:

"The rule, briefly stated, is that whenever an act of the legislature is challenged in court the inquiry is limited to the question of power, and does not extend to the matter of expediency, the motives of the legislature, or the reasons which were spread before them to induce the passage of the act. This principle rests upon the independence of the legislature as one of the co-ordinate departments of the government. It would not be seemly for either of the three departments to be instituting an inquiry as to whether another acted wisely, intelligently, or corruptly."

In *Chesapeake & Potomac Tel. Co. vs. Manning*, 186 U. S. Rep., p. 238, at 245:

"But it is well settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such

knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action."

Judge Cooley in F. & F. Company vs. Woodhull, 25 Mich. 99, 102, 107, said:

"The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but, from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And if the records show no investigation, we must still presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances when acting within the limits of its authority.

• • • • • • •

"It is not consistent with legislative independence and dignity, that the courts should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions. *These two departments of the government being co-ordinate, and neither of them occupying a position subordinate to the other, the conclusions of each must be accepted by the other as proceeding from good motives, and as warranted by the proper*

*information. * * ** It is, therefore, in the highest degree impertinent and obtrusive, when either department undertakes to advise the other, that in the exercise of its proper functions, it had acted *unwisely and indiscreetly; has misjudged the facts or perverted the law, and its action must be still more offensive, if it entertains the appeal of parties from the decisions of the other, when acting within a province which was set apart to be peculiarly under its jurisdiction and control. Moreover, there is in the nature of the case, and the difference in the manner in which legislative and judicial functions are performed, reason sufficient to demonstrate the impossibility of a proper review by the one department of the decisions the other has made. Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the ex parte petitions of interested parties, upon anything in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law. Even an unreasonable prejudice, if general or widespread, may sometimes very properly be a controlling consideration, when the case is such that to the enforcement of the law, a strong supporting public sentiment would be a necessity. But these are things the courts must not allow to influence their action."*

In *New Orleans vs. Warner*, 175 U. S. 120, 145, the court said:

"It may be that the action of the common council was dictated by improper considerations,

though this is rather hinted at than asserted; but from the case of *Fletcher vs. Peck*, 6 Cranch, 87, 130, to the present time we have uniformly refused to inquire into the motives of legislative bodies."

• • • • •

"It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice."

And in *Soon Hing vs. Crowley*, 113 U. S. 763, 719, the court said:

"The principal objection, however, to the ordinance is founded upon the supposed hostile motives of the supervisors in passing them. • •

The rule is general with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the Legislators in passing them except as disclosed on the face of the acts. • • • Their motives considered as the moral inducements for their votes will vary with the different members. The diverse character of such motives and the impossibility of penetrating into the hearts of men preclude all such inquiries as impracticable and futile."

In *State vs. Gordon*, 223 Mo. supra, the court said:

"The vote of the People on a proposition stands as in the nature of a legislative act" (p. 17).

A good case on the whole subject, showing that the foregoing rules apply to electors as quasi-legislative bodies, with particular force, and forbid courts to im-

pugn their motives or knowledge and sustaining a submission to the electors as against minor defects, is the case of *Allen vs. State*, 44 L. R. A. (N. S.) 468, 469, 472, 477-8:

"Timely appeal to the courts upon the questions now raised, if meritorious, would have settled the matter before the election was held. However, the measure was submitted to the voters without question. They were invited to believe that the formalities of the law pertaining to the submission of the measure had been fully met. The expense of the election was incurred, and the electors, imbued with the conviction that they were performing one of the highest functions of citizenship, and not going through a mere hollow form, we may assume, investigated the question, and went to the polls and voted thereon. * * *

If such sanctity and verity may be given to the acts of the delegated representatives of the people in legislative body assembled, it must with clearer reason and with greater force be given to the governmental power, the record of which, in its lawmaking capacity, is authenticated and promulgated as the Constitution provides. * * *

In Constitutional Prohibitory Amendment, 24 Kan. 700, a case in some respects similar to this one, that court, speaking through *Justice Brewer* (afterwards associate justice of the Supreme Court of the United States), at page 720, said: 'After the contest was ended and election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement, and struggle was simply a stupendous farce, meaning nothing, accom-

plishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority. *Gilleland vs. Schuyler*, 9 Kan. 569; *Morris vs. Vanlaningham*, 11 Kan. 269; *Wildman vs. Anderson*, 17 Kan. 344; *Jones vs. Caldwell*, 21 Kan. 186; *Lewis vs. Bourbon County*, 12 Kan. 186. In the opinion of the case last cited, we said, speaking of a case somewhat similar: "Notwithstanding the silence of the statute and the omissions of the order, an election would, doubtless, be valid, where the people generally acquiesced in the manner and took part in the election." We could not have used language more apt if we had been anticipating this very case. While estoppel may not technically bind either party to an election, yet where a mere defect of form exists, which may, if presented seasonably, be fully corrected, and is not suggested until after the election is over, there is eminent justice in applying the principles of estoppel, and holding that they who have gone to trial on the merits shall not, when beaten there, go back to an amendable defect in the preliminary proceedings.' "

The principle, in short, is that the legislators—in this instance the people—in exercising their sovereign prerogative of law making, are not infants, subject to the guardianship of courts, but they are conclusively pre-

sumed to know their own minds, made up upon grounds satisfactory to themselves.

The proceedings in this instance:

In the light of these rules and decisions let us examine the proceedings in this case.

The ordinance was first introduced in the Common Council on January 6th, 1920, following receipt of a message from the Mayor relative to same. On January 27th the ordinance was passed, effective February 27th. On February 24th, 1920, the Common Council authorized the Board of Street Railway Commissioners to print copies of the ordinance with a map of the proposed routes thereon (R. p. 64). The distribution of these pamphlets continued up to the date of election and the contents of same was not considered sufficiently prejudicial of any rights of plaintiff or others to ask that the distribution of same be enjoined. These matters now alleged as misrepresentative and misleading were all matters of minor consequence during the campaign—*then* the question being whether the City should proceed to actual municipal ownership and operation.

The proposition was simple and easily understood. It was:

“Shall the City of Detroit be authorized and empowered to acquire, own, maintain and operate a street railway system upon the surface of the streets, avenues and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits that the public convenience may require, for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof, as hereinafter designated,

to-wit: (Here follows description of streets) and to borrow money on the credit of the City of Detroit by issuance of the public utility bonds of the City of Detroit up to an amount not to exceed \$15,000,000, for the purpose of so acquiring and owning said street railway system."

(A copy of the ballot upon which this question appears is found at R. p. 81.)

The electors were not asked whether they favored the *construction* of a new system or the *purchase* of an existing system; they were asked to *authorize* and *empower* the City of Detroit to *acquire*, own, maintain and operate a street railway system upon certain designated streets and to borrow \$15,000,000 for the purpose of so *acquiring* and owning said system.

Let us further analyze the ordinance. Its title indicates it to be, among other things, "An Ordinance relative to acquiring, owning, maintaining and operating a street railway system upon the surface of the streets, alleys and public places of the City of Detroit and within a distance of ten miles from any portion of its corporate limits *that the public convenience may require* for the purpose of supplying transportation to the City of Detroit and the inhabitants thereof."

Section 1 provides that the Common Council of the City of Detroit declares a public improvement to be necessary in the City in connection with transportation matters upon the streets, alleys and public places described.

Section 2 provides for the submission of a proposition in order to authorize and empower the City to acquire, own, maintain and operate a street railway sys-

tem upon such streets, alleys and public places as designated and in order to empower the City to borrow \$15,000,000 to finance same.

Section 3 provides that in order to carry out the purposes of the ordinance that a special election be held on April 5th, 1920, and said *proposition* be at that time voted upon.

Section 4 provides that "if any clause in this ordinance shall, for any reason, be adjudged or decreed to be invalid by any court of competent jurisdiction, such judgment or decree shall not effect, impair or invalidate the remainder of this ordinance, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy."

Firstly, it will be noted that the people did not vote upon the ordinance; they were voting upon a *proposition* of whether the City should be *authorized* to acquire a street railway system and to provide funds to pay for it.

Secondly, it will be noted that the proposition is not whether the city *shall* construct the lines designated, but the proposition is "Shall the City of Detroit be *authorized and empowered to acquire, own, maintain and operate a street railway system.*"

Thirdly, the lines to be acquired is a question for the public authorities to determine from time to time within the provisions of the Charter. If it should be determined that *existing* lines be taken over it could only be done by a subsequent approval of the voters. No claim is made in the bill that it was ever asserted that *existing* lines could be purchased, condemned or leased without a subsequent approval of the voters. It is entirely conceivable that the Detroit United Railway might wish to take ad-

vantage of its occupation of the streets and demand an excessive valuation. The proposition, not being limited to purchase, gives the City the power to construct and the money to pay for it. Inasmuch as it was public knowledge that no contract existed for the purchase of the Woodward Avenue and Fort Street lines and that Company could refuse to sell same, thus requiring the very disarrangement of traffic and public inconvenience it argues those voting for the proposition never intended, how can it be presumed, as contended for by plaintiff, that the voter did not intend such a result? It may be they hoped such would not be the result, but they certainly authorized and intended to authorize construction on these streets if purchase could not be effected.

There is nothing in the proposition that defined when or in what order of development the lines shall be acquired. There is nothing in the proposition that requires any or all of said lines to be constructed or purchased.

The City of Detroit has been attempting to solve its street transportation problems for a period of twenty-five years. Since 1893 no franchise has been granted to any street railway utility. As early as 1899 the City, under a state law, attempted to acquire the existing street railway system. In *Attorney General vs. Pingree*, 120 Mich. 550, the Supreme Court decided no municipality had the constitutional right to engage in municipal ownership and operation. In 1907 the City attempted to construct tracks on the claim same were a part of the street improvement, but this was prohibited (*Attorney General vs. Detroit Common Council*, 148 Mich. 77). In 1908 the constitution was amended and sections 23, 24 and 25 of Article VIII provided for such municipal ownership and operation upon approval by

a three-fifths vote. Then followed the enabling provisions of the Home Rule Act and in 1913 the municipal ownership amendment to the City Charter. Since 1913 two propositions to buy the existing system have been defeated by the people. Municipal ownership opponents contested each of these steps (*Attorney General vs Common Council*, 164 Mich. 371) (*Attorney General vs. Lindsay*, 178 Mich. 546). The mischief and evil which the proposition of April 5th, 1920, was designed to cover was congested cars, lack of seats, loss of time and a correction of an intolerable transportation system. The legislative and judicial history thus clearly establishes the conviction that the people desired to solve their transportation difficulties by municipal ownership and operation and that they acted with great deliberation.

To hold that the 89,785 people who voted for this proposition were deceived or did not understand what they voted for would be an act of injustice.

If any misunderstanding exists among those who voted for the proposition, a full remedy exists. Under Chapter II, Title III, of the Charter, provision is made for the initiative. If the conditions complained of in the bill actually exist the people have easy redress to relief by preparing an initiatory ordinance for the repeal of the proposition.

In *Wheeler vs. City of Denver*, 231 Fed. Rep. 16, it was said:

"We are also of the opinion . . . that the validity of the bonds must be determined from an examination of said section and that alone—we are strongly persuaded to adopt their views, not only from the language used, but from a

consideration of the fact that the electors of the city and county of Denver knew of the trouble existing between the city and county of Denver and the Denver Union Water Company and that they legislated particularly with reference thereto."

Contents of Proposition.

We think it is clear from counsel's brief that plaintiff recognizes that said proposition standing alone and adopted by the requisite vote would be a valid submission. But plaintiff says the people were deceived because a part of section one of the ordinance was not a part of the proposition.

This argument by counsel for plaintiff and appellant proceeds upon two material misconceptions of facts. They state (1) that the *ordinance* of February 27th, 1920, was voted on by the people and that (2) a *sample ballot* was submitted to the people. The ordinance of February 27th, 1920, was not voted on by the people, and (2) no sample ballot was submitted to the people. A pamphlet containing the essential parts of the ordinance and plan was circulated.

The matter voted upon was the *proposition* contained in section 2 of the ordinance of February 27th, 1920. Sections 1, 3, 5 and 6 of the ordinance were not submitted, as same were merely matters of detail in no way involved in the proposition itself.

(a) Complaint is alleged because the Proposition did not contain the expression:

"And said Board of Street Railway Commissioners shall construct, own, maintain and oper-

ate in said City of Detroit for said City of Detroit and within a distance of ten miles from any portion of its corporate limits."

This sentence is found in one part of Sec. 1 of the Ordinance and the claim is it ought to have been included in the Proposition, but the answer is two-fold:

First: The Proposition was not in any way dependent upon the terms of Sec. 1 of the Ordinance, they might even have been in express conflict with each other without in any way invalidating the People's vote. There was and is no necessary connection between the two, the Ordinance could have been enacted at another time, before or after—or not at all—and it would not have affected the validity of the People's vote.

And, *Second:* The reason this expression does not appear in the proposition was because the council did not care to limit the authority asked of the people and the use of the \$15,000,000 to *construction* only. It was desired to obtain a vote upon the proposition to authorize a comprehensive plan for a municipal street railway which would enable the public authorities to then decide whether such acquisition should be by purchase, condemnation, lease, by construction or by any combination of these methods, without increase of the sum first requested.

This particular provision of Section one can have no possible relation to any claim of fraud or misrepresentation. It does not limit the proposition contained in Section two. *Section one could have been amended any time before election and can be amended now*, so long as it does not exceed the authority conferred by the people in the proposition. The ordinance submitting the proposition would have been effectual without section one.

But the language of the ordinance directing the Street Railway Commission to *construct* the lines described (even if this were the only language in Sec. 1) would not prevent the Commission from purchasing existing trackage provided the contract of purchase be approved by the voters. No such absurd limitation is contained in the legal meaning of the word *construct*.

In *Attorney General vs. Detroit Common Council*, 148 Mich., page 92, the Supreme Court held:

"If the City possesses the power to lay tracks as a part of the street structure, for the same reason it has a right to purchase those already laid from the company or companies owning them. *The right to construct necessarily implies the right to purchase.*"

Plaintiff confuses entirely the distinction which plainly exists between *authority* to purchase and mere approval of a specific contract of purchase.

Suburban lines:

(b) Plaintiff also asserts that the City of Detroit cannot lawfully obtain the right to construct lines in Highland Park or Hamtramck (these are suburbs of Detroit, lying wholly within the city limits, but having separate municipal organizations) and that the proposition is void because said lines are an essential part of the municipal system. No authority is cited for this statement. On the contrary, Section 23, Article VIII, of the Michigan Constitution provides:

"Subject to the provisions of this Constitution, any city or village may acquire, own and operate, either within or *without its corporate limits* pub-

lic utilities for * * * transportation to the municipality and the inhabitants thereof * * * and may operate transportation lines *without the municipality* within such limits as may be prescribed by law * * *

Section 3307, Michigan Compiled Laws of 1915, as amended, provides:

"Each city may in its charter provide:

(j) For owning, constructing and operating transportation facilities within its limits and its adjacent and adjoining suburbs within a distance of ten miles from any portion of its city limits * * *

(k) * * * for the acquirement, ownership, establishment, construction and operation, either within or without its corporate limits, of public utilities for supplying * * * transportation to the municipality and the inhabitants thereof * * * and for the operation of transportation lines *without the municipality* and within ten miles from its corporate limits."

Chapter XIII, Title IV, of the City Charter, contains similar provisions.

There is thus full constitutional and statutory power to enable the city to obtain the right to construct lines in these municipalities with their consent.

Plaintiff further asserts that the construction of tracks in Hamtramck and Highland Park is an essential part of the municipal system. That this is not so is apparent from a study of the map. The trackage represents but a small fraction of the total mileage. Lines can be stopped at the boundaries of each of these municipalities without interfering with the plan of the municipal

railway system. This would merely change the point of origination of traffic, but any passenger may still go directly to any other point on the city system. These lines are in no sense an essential part of the city system.

It will be noted that the language of the proposition is limited to the acquisition of such lines within 10 miles of the corporate limits *that the public convenience may require* (R. p. 80). Whether the public convenience requires these lines is certainly a legislative matter for the public authorities to pass upon when reached, and is not a judicial question.

A study of the bill indicated that great stress is laid upon the general layout of the City of Detroit; that the proposed Municipal System would not fit into this layout; that if traffic was stopped on the Fort Street lines the public would suffer inconvenience. A sufficient answer to all such claims would seem to be the admitted fact that the people in whose concern the plaintiff shows such interest voted favorably thereon.

Instructions:

(c) Objection is also made to the instructions to voters which appear upon the pamphlet distributed prior to the election. No objection is made to the instructions which appear upon the ballot voted upon by the electors.

Section 9, Chapter 1, Title II, of the Charter, provides:

"The election commission shall have authority to place on the ballot such headings and instructions and such endorsements as it shall deem proper and sufficient."

The instructions appearing upon the pamphlet in this case are in no respect analogous to the Illinois case cited

by plaintiff. There the objection was made because the voter was instructed to vote "yes" if he believed in municipal ownership. Here the instruction on the pamphlet was to vote "yes" if he favored the acquisition, ownership, maintenance and operation of a municipally owned street railway system in the City of Detroit and to vote "no" if such a proposition was not favored. The entire proposition was before the voter and it cannot be said that this was in any sense an appeal to everybody who believed in municipal ownership but who might not favor the particular proposition. But this instruction was merely the informal and unofficial wording of the Board of Street Railway Commissioners on a matter of publicity prior to the election.

The instruction on the official ballot prepared by the City Election Commission was as follows:

"If you favor the following proposition put a cross (X) in the square after the word *Yes*. If you do not favor the following proposition put a cross (X) in the square after the word *No*."

There was no appeal in this to the voter because he favored municipal ownership; no reference was, in fact, made to municipal ownership; the instruction was directed solely to the proposition contained on the ballot. It would be hard to conceive of a fairer instruction than that appearing in the instant case.

While we have thus demonstrated that the instruction was legal and proper nevertheless we deem it meet to call the attention of the Court to the fact that there is no allegation in the Bill of Complaint on this point.

To conclude we respectfully submit:

(1) The District Court was without jurisdiction and the proper order in that case should be made; or (2) the Decree should be affirmed.

Respectfully,

Clarence E. Wilcox.

Alfred Lucking.

Counsel for Appellee.

APPENDIX

Chapter XIII of Charter of City of Detroit of 1918.
STREET RAILWAY COMMISSION.**Municipal Ownership and Operation of Street Railway System:**

Section 1. The city shall at once proceed to, and as soon as practicable acquire or construct and own, maintain and operate a street railway system beneath, upon and above the surface of the streets of the city and within a distance of ten miles from any portion of its limits that the public convenience may require; and as soon as practicable said system shall be made exclusive. Nothing herein contained shall be construed to prevent the city from making a grant to private parties in relation to said street car system beneath, upon and above said streets.

Commission Created; Appointment; Compensation; Removal:

Sec. 2. There shall be a board to be known as the Board of Street Railway Commissioners, which shall consist of three members, who shall be appointed by the mayor. Said board shall serve without salary and be subject to removal at the will of the mayor.

Oath; Bond; Vacancies; Officers and Assistants:

Sec. 3. Each commissioner shall take and file in the office of the city clerk the oath of office prescribed for city officers and shall execute a bond in a sum to be

determined by the mayor, conditioned as is prescribed for city officers. Any vacancy on said board shall be filled by the mayor. The board shall name a president and secretary. Said board shall have full power and authority to appoint a general manager, and to employ inspectors, accountants, attorneys and other officers, agents and servants for the purpose of enabling it to properly perform all of the duties incumbent upon it, and shall pay them out of the earnings of the said railway system.

Assistance of Other Departments:

Sec. 4. The board shall have power to call upon the city engineer, city clerk, commissioner of public works or other city officers for any service that may be required in connection with the work of said board.

Deeds; Contracts; Leases; Purchases:

Sec. 5. All deeds, contracts, leases or purchases shall be made in the name of the city of Detroit by the president of said board and the secretary thereof.

Duties of Board:

Sec. 6. It shall be the duty of said board to proceed promptly to purchase, acquire or construct and to own and operate a system of street railways in and for the city, and as soon as practicable to make said system exclusive. Said board shall, whenever it deems it necessary, build extensions and new lines. Such extensions and new lines shall be first approved by the common council.

Aquisition of System:

Sec. 7. Said board may purchase or lease, or by appropriate proceedings prescribed by law and in the name of the city condemn all or any part of the existing street railway property in the city and in like manner said board shall have power to aquire a street railway property without the limits of the city as prescribed by law, if the board shall determine; or it may make the necessary purchases of lands, machinery, engines, ties, rails, poles, wires, conduits, cars, tools and all other articles, apparatus, appliances, instruments and things necessary to construct, own, maintain and operate, and said board shall construct, own, maintain and operate in said city for said city and within a distance of ten miles from any portion of its limits as aforesaid, a system of street railways beneath, upon and above such streets and other places in the city and outside thereof as aforesaid as the common council shall from time to time elect.

Approval by Electors:

Sec. 8. Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote.

General Bonds:

Sec. 9. The common council shall on the request of the board issue, in such amounts as will not exceed the legal bonding limit of the city, bonds of the city to be known as public utility bonds up to the amount of two per cent of the assessed value of the real and personal property of the city. Said bonds shall be payable by the city at such time or times and at such rate of interest as the board and common council may determine. The common council shall sell all or any part of said bonds at any time and from time to time upon the request of the board and pay the proceeds to the city treasury and said proceeds shall be used for the purpose of securing in some one of the ways herein provided a public street railway system in the city and within the ten miles outside aforesaid.

Sec. 10. The common council shall likewise on request of the board issue further or additional bonds of the city, to be known as street railway bonds in such denomination and payable at such time or times and bearing such rate of interest as the council and said board may determine. These bonds may be issued regardless of the city's bonding limit. Said bonds shall impose no liability on the city and shall be secured only upon the property and revenues of the street railway system, including a franchise stating the terms upon which in case of foreclosure and purchase, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of purchase of the street railway system and the franchise on foreclosure.

Sec. 11. The board shall prepare a franchise and submit the same to the common council and the council shall submit it to the electors of said city, and if approved by three-fifths of the electors voting thereon said franchise shall be valid. If not approved by the electors, the board shall continue to prepare and present franchises as aforesaid until a franchise is approved by three-fifths of the electors voting thereon at any general or special election.

Sec. 12. When the franchise has been submitted and approved by the electors as herein provided, then the board may request, and the common council shall issue and sell enough of said street railway bonds to complete the payment of the purchase price or the award in condemnation proceedings or the cost of construction, and whenever any extension to said street railway system is authorized as herein provided, the common council shall issue and sell a further and additional amount of said street railway bonds sufficient to pay the actual cost of the extension and no more. It shall pay and deliver into the city treasury the proceeds of said additional issue of street railway bonds and out of said proceeds the board shall pay the cost and expenses of said extension.

Sec. 13. The board, subject to the approval of the mayor, shall have the supervision, management and control of the entire public street railway system of Detroit, both in its construction and maintenance and operation as fully and completely as if said board represented private owners. The board shall report its doings to the common council annually and at such other times as the council may direct.

Rate of Fare:

Sec. 14. The rate of fare on said street railway system shall be sufficient to pay, and the said board shall cause to be paid:

- (a) Operating and maintenance expenses, including paving and watering between tracks;
- (b) Taxes on the physical property of the entire street street car system, the same as though privately owned;
- (c) Fixed charges;
- (d) A sufficient per cent per annum to provide a sinking fund to pay the principal of the mortgage bonds issued at their maturity and such other additional per cent per annum to provide, in the sound discretion of the board, a sinking fund to pay the principal of the general bonds issued as soon as practicable, to the end that the entire cost of said street railway system shall be paid eventually out of the earnings thereof.

Apparatus; Appliances; Sale of Light, Heat and Power:

Sec. 15. Said board shall have power to secure, erect or install the necessary apparatus, appliances and connections and to supply or sell from its surplus, if any, electric light, heat and power to any and all applicants therefor at a reasonable price, but not below cost: provided, that whenever the public lighting commission is prepared to furnish all or any part of the power required by the board for its purposes, such board shall procure said power from such commission.

Plant: By-Products:

Sec. 16. The board shall as soon as practicable, have in use and shall thereafter maintain a plant or plants with suitable modern economies and may sell, consume or distribute all its by-products.

Claims:

Sec. 17. All claims that may arise in connection with said railway system shall be presented as are ordinary claims against the city. Provided, that written notice of all claims based upon injury to persons or property must be served upon the city clerk, within sixty days from the happening of the injury, but the disposition thereof shall rest in the discretion of the board and the cost of investigation, attorney's fees, all claims that may be allowed and final judgments obtained from said claims shall be paid from the operating revenues of said railway.

Penalty for Injury to Property:

Sec. 18. Any person who shall cut, break, injure or destroy any of the property owned by the city and in control of said board, with intent to prevent or interrupt the business of the board, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment not exceeding sixty days or both fine and imprisonment in the discretion of the court. Proof that the act was wilful shall be prima facie evidence of such intent.

Arbitration of Disputes with Employees:

Sec. 19. In case of dispute over wages or condition of employment, said board is hereby authorized and directed to arbitrate any question or questions, provided each party shall agree in advance to pay half the expense of such arbitration.

Annual Estimate:

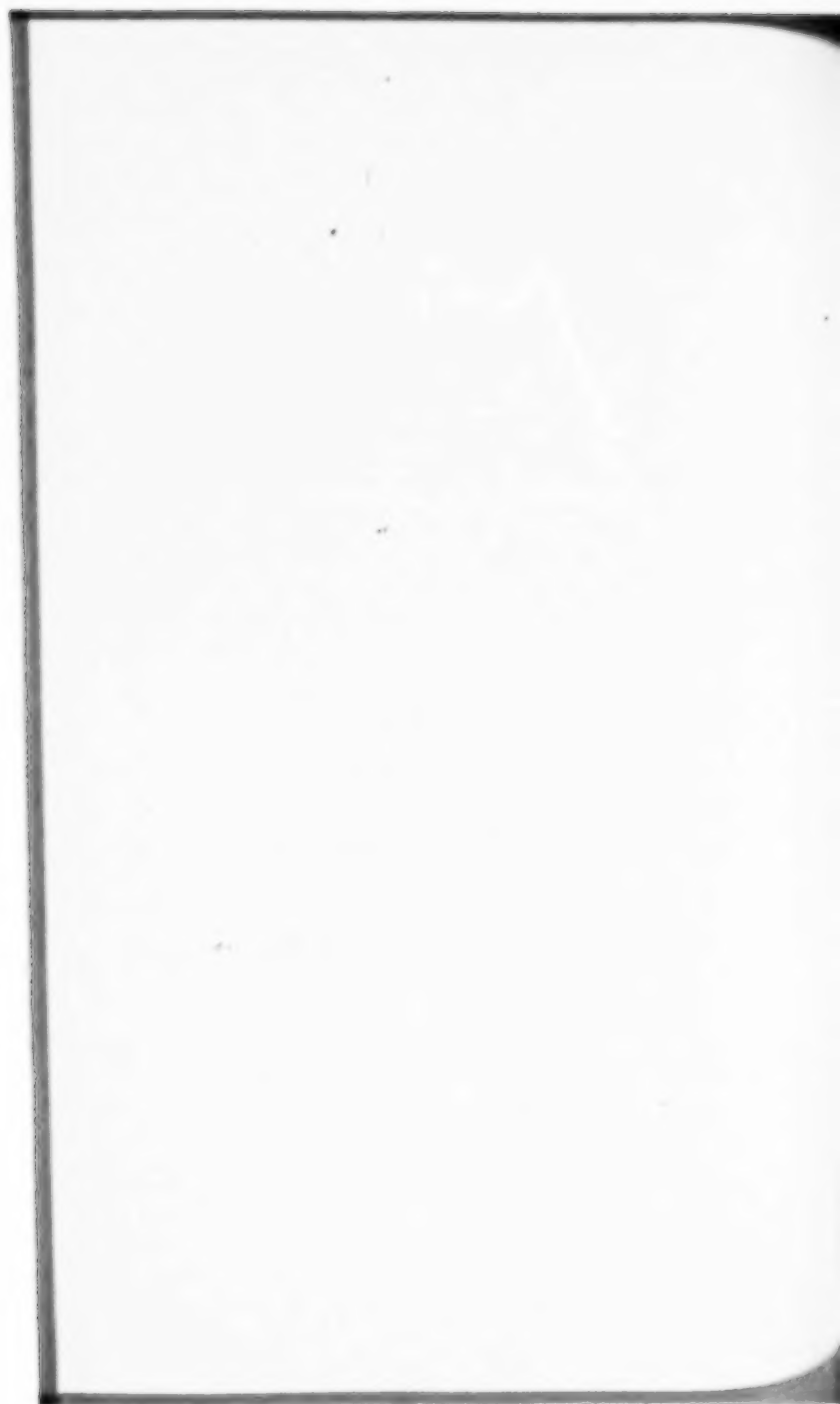
Sec. 20. On or before the fifteenth day of January of each year, the board shall transmit to the city controller its estimate in duplicate of the amount of money required for its purposes for the ensuing fiscal year. The common council may adopt ordinances not in conflict herewith to carry out the purposes and provisions of this chapter.

Disbursements:

Sec. 21. All money received from any source in relation to said street railway shall be paid into the city treasury and disbursed and paid out only upon vouchers signed by the president and secretary of the board and duly approved and countersigned by the controller.

President of Commission Ex-Officio Member of Board of Supervisors:

Sec. 22. The president of the commission shall be a member ex-officio of the board of supervisors of the County of Wayne.



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JAMES O. MALLON,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 492.

DETROIT UNITED RAILWAY, APPELLANT,

VS.

CITY OF DETROIT, APPELLEE.

ADDENDA TO BRIEF FOR APPELLEE, CITY OF DETROIT.

CLARENCE E. WILCOX,
ALFRED LUCKING,

Counsel.

ADDENDA TO BRIEF FOR APPELLER, CITY OF DETROIT.

Bottom of p. 32—That had motives of City Officials will not deprive city of its right to remove plaintiff's property from street.

Doyle vs. Continental Insurance Code, 94 U. S., 541-2.

Top of p. 43—That there is a vital difference between a water supply case, and supplying street railway transportation.

Attorney General vs. Fongsee, 120 Mich., 561-2.

Top of p. 65—That it was competent and proper to submit the proposition on ballot exactly as done in this case.

Clark vs. Manhattan, 1 A. L. R., 1534 (175 Cal., 637).

Oakland vs. Thompson, 151 Cal., 576.

Thompson Co. vs. City, 42 Fed., 723, 727.

Middle of p. 81—No estimate of cost was required to go with the submission; an election not invalid because cost will prove (as alleged in bill) greater than amount voted.

Wheeler vs. Denver, 231 Fed., 8.

(Appeal dismissed, 245 U. S., 626.)

People vs. Kelley, 76 N. Y., 492-494.

Chostkov vs. Pittsburgh, 177 Fed., p. 936.

Marcy vs. Onkosh, 31 L. R. A. (N. S.), 799.

Middle of p. 67—That courts will conclusively presume full and accurate knowledge and good faith on part of legislators, allegations that legislation is obtained by misrepresentations, etc., amount to nothing.

U. S. vs. Des Moines, 142 U. S., 544-5.

Top of p. 72—That the same rules apply to Legislative Acts by the sovereign people (by referendum).

State vs. Gordon, 223 Mo., p. 23.

Allen vs. State, 44 L. R. A. (N. S.), 468.

Epping vs. Columbus, 117 Ga., 285.

Top of p. 58—That no franchise by implication of law against positive constitutional provision.

Carpenter, J. (one of appellants' counsel in this case).

Attorney General vs. Detroit Common Council, 148 Mich., 79.

Middle of p. 42—That the Michigan Constitution is a bar against any such new franchise as claimed in this case.

First Denver Water Case, 229 U. S., 139-140.

Mr. Justice Hughes participated in this judgment.

Bottom of p. 58—That no franchise by implication of law on account of public necessity for service.

Detroit vs. D. U. R., 172 Mich., 136.

Same case, 229 U. S., 39.

Mr. Justice Hughes participated in this judgment.

Middle of p. 58—That no implied franchise from necessity of city for service even where the service has been accepted after expiration of franchise.

Cedar Rapids Water Case, 118 Ia., 235, 239.

Middle of p. 22—That it is perfectly lawful for city to make offer for plaintiff's property in street, or notify it to remove same.

Denver vs. New York Trust Co., 229 U. S., 123.

Mr. Justice Hughes participated in this judgment.

SUPREME COURT OF THE UNITED STATES.

No. 492.—OCTOBER TERM, 1920.

Detroit United Railway, Appellant,	} Appeal from the District Court of the United States for the Eastern District of Michigan.
<i>vs.</i>	
City of Detroit et al.	

[February 28, 1921.]

Mr. Justice DAY delivered the opinion of the Court.

The appellant, plaintiff below, sets forth in its bill that it is the owner of a system of street railways in the city of Detroit, and suburban lines running from said city. The suit was brought in the District Court, to enjoin the city of Detroit and the other defendants, municipal officials, from acquiring or constructing a system of street railways, which had been provided for by an ordinance of the city, with an issue of \$15,000,000 of its bonds for that purpose and approved by the requisite majority at a municipal election.

The grounds of relief, briefly stated, are: That establishment of the system and the issue of the bonds should be enjoined at the instance of the plaintiff because the ordinance was not legally adopted by the voters of the city of Detroit and, if carried into effect, as proposed, and by the methods which brought about its adoption, a deprivation of plaintiff's property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States would result.

The District Court maintained the jurisdiction upon the Federal ground alleged, and dismissed the bill upon motion in the nature of a demurrer. The case is brought to this court by direct appeal because of the constitutional question involved.

The bill is very voluminous and abounds in argumentative statements attacking the passage of the ordinance, and the good faith

of the officials concerned in bringing about its enactment. Among the streets, proposed to be occupied by the city, are those upon which it is alleged the trackage and property rights of the complainants are sought to be acquired, and upon which the franchise grants of the Street Railway Company have expired.

This court in *Detroit United Railways v. City of Detroit*, 229 U. S. 39, affirming the judgment of the Supreme Court of Michigan in the same case, 172 Mich. 136, held that where a street railway company, operating in the streets of the city under a franchise granted for a definite period, has enjoyed the full term of the grant, the municipality may, upon failure of renewal of the grant, require the company within a reasonable time to remove its tracks and other property from the streets, without impairing any contractual obligations protected by the Federal Constitution or depriving the street railway company of its property without due process of law. We see no occasion to depart from the principles announced in that case. The decree is in the record and, so far as anything appears, is still in full force and effect. If the courts of Michigan shall see fit to carry it into execution we find nothing in the Federal Constitution which would make its enforcement a deprivation of due process of law.

The Railway Company claims to have acquired property rights in the streets of the city, upon which its franchises have expired, by reason of matters set out in the bill and supported in the argument submitted by the appellant. Reference is made to certain so-called day-to-day arrangements, by which continued operation was permitted notwithstanding the expiration of franchise rights. But an examination shows that construction and operation under such agreements gave the Railway Company no extended franchises in the streets, because it was expressly provided that the permits granted might be revoked, and that action under the day-to-day agreement should not waive the rights of either party.

Rights to remain in the streets are also claimed under the so-called Kronk Ordinance, which was before this court in *Detroit United Railways v. Detroit*, 248 U. S. 429, in which this court, while reaffirming the principles laid down in *Detroit United Railway Co. v. Detroit*, 229 U. S., *supra*, found that the city had not up to that time availed itself of the right to compel the removal of the tracks in streets where the company had no franchise, but had

passed an ordinance looking to the continued operation by the company of the street railway system for a limited period; and, that while it acted under this ordinance there was the equivalent of a grant to operate during its life, entitling it to a fair return; that the ordinance by its express terms provided for its amendment or repeal, and, that unless amended or repealed, it should remain in force for the period of one year. We do not perceive how that ordinance can now give rights to the company in the streets where the franchises have expired.

The chancery suit brought in the Wayne County Circuit Court in the name of the city of Detroit, in which a decree was granted, is also set up. An examination of that decree, which is attached to the bill, satisfies us that it was intended only to provide a temporary arrangement by which cars might be operated on the street railway system of the complainant. It is expressly stated in the decree that it shall not affect any fundamental rights of the parties in and to the streets of the city of Detroit as they at that time existed; the intention being to provide for the rate of fare at which cars should be operated; the decree being considered only a temporary solution of the problem before the court.

Allegations are made which are supposed to have the effect of estopping the city of Detroit from denying the franchise rights of the plaintiff in the streets of the city because of expenditures of large sums of money with the knowledge and acquiescence of the city authorities and the people of the city since the franchises have expired.

Under the Constitution of Michigan, Section 25 (as revised 1908), it is provided that no city or village shall grant any public utility franchise, which is not subject to revocation at the will of the city or village, unless such proposition shall first have the affirmative vote of three-fifths of the electors. This phase of the case is covered in principle by our decision in *Denver v. New York Trust Co.*, 229 U. S. 129, in which a similar provision of the Colorado constitution was under consideration, and wherein this court in speaking of the provision of the constitution of the State of Colorado, said:

“Besides, Article 20, Sec. 4, of the state constitution then in force provided that no franchise relating to the streets of the city should be granted except upon a vote of the electors, and Article

9 of the city charter then in force made a like vote a prerequisite to the acquisition by the city of any public utility. So, had the council attempted by the ordinance of 1907 to make an election to purchase or renew, the attempt would have gone for nothing."

The provision of the constitution of Michigan, in force when the ordinance here in controversy was passed, necessarily prevents acquiring rights by estoppel which might arise were the franchise within the power of the city to grant. In *Denver Water Co. v. Denver*, 246 U. S. 178, the provision of the Colorado constitution was not considered. Nor in *Detroit United Ry. v. Detroit*, 248 U. S. 429, was reference made to the like provision of the Michigan constitution now relied upon.

The charge is made at length in the bill that the city officials, by means of the proceedings complained of, are engaged in a scheme designed to compel the company to part with its property at a sum much less than its fair value, or to cease to operate in the streets and to remove its property therefrom. In this connection it is charged that the real purpose is to compel the sale of the property of the Street Railway Company at \$40,000 per mile of track, which is far less than its actual value. The giving effect to this scheme, it is averred, would work a deprivation of constitutional rights of the complainant in violation of the Fourteenth Amendment. But, if the city has the right to acquire the property on the best terms it can make with the company in view of the expiration of the franchises, an attempt to carry out such purpose by an offer to buy the property at much less than its value would not have the effect to deprive the company of property without due process of law. It was so ruled in *Denver v. New York Trust Company*, 229 U. S., *supra*. In that case this court, in speaking of an alleged attempt of the city to acquire the company's plant after the expiration of its franchise for much less than its fair value, among other things, said:

"Whether \$7,000,000 is an adequate price for the company's plant, and whether its value will be ruinously impaired by the construction of a municipal plant, are beside the question. Being under no obligation to purchase, the city is free to name its own terms, and the water company is likewise free to accept or reject them. The latter is under no compulsion other than such as inheres in the nature of its property or arises from a proper regard of its own interests. That the city, mindful of its interests, offered \$7,000,000 for the water company's plant, when it could have pro-

ceeded to the construction of a new plant of its own, without making any offer to the company, affords no ground for complaint by the latter."

Furthermore, it appears that under the charter of the city of Detroit, notwithstanding the alleged attempt to procure the property of the complainant at much less than its value, no such purpose could be effected by purchase without approval of the electors of the city. Section 8 of the charter provides:

"Any contract to purchase or lease herein contemplated, or any plan to condemn existing street railway property shall be void unless approved by three-fifths of the electors voting thereon at any regular or special election, and upon such proposition women tax payers having the qualifications of male electors shall be entitled to vote."

No such contract has thus far been made, and there is nothing in the ordinance attacked which undertakes to acquire the property of the complainant without compliance with this charter provision.

The bill abounds in allegations that voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular, and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law. The principle has been declared by this court. *Angle v. Rwy. Co.*, 151 U. S. 1, 18; *Soon Hing v. Crowley*, 113 U. S. 703, 710. This feature of the bill is an attempt to inquire in a collateral way into the validity of an election which was held without steps being taken to enjoin, and which was vigorously contested to a final result.

The charter of the city of Detroit gave ample power to the city to acquire, construct, own, maintain and operate a street railway system on the streets of the city within a distance of ten miles from any portion of its corporate limits that the public convenience may require. (Sec. 1, ch. 13, Charter of Detroit, 1918.) Section

6 of the Charter makes it the duty of the Board of Street Railway Commissioners to promptly proceed to purchase, acquire and construct, own, and operate a system of street railways in and for the City, and as soon as possible to make the system exclusive. Section 7 gives the Board power to purchase, or lease, or by appropriate proceedings to acquire, any part of the existing street railway property in the City, and to make the necessary purchases for that purpose. Section 9 gives authority to issue bonds of the city.

Under the authority of the charter the ordinance in question was passed. It directs the Board of Street Railway Commissioners to acquire, own, maintain and operate a street railway system. It requires that the proposition to acquire, own, maintain the system and to issue bonds shall be submitted to a vote at a special election. It is contended, however, that the proposal submitted did not conform to the requirements of the ordinance.

We agree with the District Court that the form of submission of the question was in substantial compliance with the law.

As to allegations of fraudulent and improper conduct of the Common Council in giving the electors information in advance of the election which misled them, the contention is that a sample ballot sent out to the electors did not definitely show the purpose to construct street railway lines where trackage already existed, and that the voters of the city were misled into believing that there was an intention not to construct the street railway lines where the same already existed, but to purchase at an estimated cost of \$40,000 per mile. But we are of opinion that this so-called official information, no complaint being made of it before the election, cannot vitiate the election when the same was had upon a submission, within the authority of the city under its charter, and the ordinance passed in the form shown. Moreover, as we have already pointed out, this ordinance does not provide for acquisition at \$40,000 per mile; nor can any purchase be made except by contract approved by the electors as provided by Section 8 of the charter. Other considerations are urged based upon lack of authority in the city which we have examined and deem it unnecessary to discuss.

We find nothing in the allegations of this bill establishing that the city of Detroit in proceeding by its officials in the manner

alleged, has done things which are subversive of the rights of the city to establish its own municipal system of street railways and to issue bonds for that purpose, or which would amount to deprivation of rights secured to the plaintiff by the Fourteenth Amendment to the Federal Constitution.

It follows that the decree of the District Court dismissing the bill must be

Affirmed.

A true copy.

Test :

Clerk Supreme Court, U. S.